Supreme Court, U.S.
FILED
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10-449 MAY 19 2010
No. OFFICE OF THE CLERK

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

EDWARD F. RICHARDS,
Petitioner

v.

HEWLETT-PACKARD CORPORATION, FORMERLY COMPAQ, FORMERLY DIGITAL EQUIPMENT CORP., INTERNAL DISABILITY MANAGEMENT, GI, LONG-TERM DISABILITY PLAN, & THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA a/k/a PRUDENTIAL FINANCIAL,
Respondents

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

# PETITION FOR WRIT OF CERTIORARI

BERNARD A. KANSKY, ESQ. FOR PETITIONER
468 COMMERCIAL ST. #100
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## QUESTION PRESENTED

Whether in ERISA proceedings, the lower courts acted properly in ignoring the opinions of the ten (10) year treating physician whose opinion was that the Petitioner was totally disabled from working and gave no weight to the fact that the Petitioner received his Social Security Disability Benefits uninterrupted, and instead gave full credence to "paper reviewing," 'experts' hired or paid for by the insurance company, who had never interviewed or examined the Petitioner but who based upon selected reports provided to them by the insurance company, determined that the Petitioner could do some type of sedentary work. This resulted in the lower courts affirming the early termination of the Petitioner's long-term disability benefits by the insurance company.

## OPINION BELOW

The circuit court opinion below is published at 592 F 3rd 232 (1st Circuit 2010).

## JURISDICTION

The First Circuit Court entered its initial decision on January 19, 2010 and denied the Petitioner's Request For En banc Hearing and Reconsideration on February 18, 2010.

## STATUTORY PROVISION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

## STATEMENT OF FACTS

The Petitioner became totally and permanently disabled in 1991 with a diagnosis of Chronic Fatigue Immune Dysfunction Syndrome and Fibromyalgia. He applied for and was awarded Social Security Disability Benefits and ERISA LTD benefits which

ERISA benefits were paid for 10 years and then terminated by the insurance plan administrator based upon paper reviewing experts engaged by it. The courts below accepted the opinions of the paper reviewing experts and the insurance staff /employee that the Petitioner could perform some kind of sedentary work even though the position he was disabled from in 1991 was sedentary. The lower courts gave no weight to the detailed narrative reports to the contrary, of his treating physician of more than ten (10) years, determined that the Petitioner had not met his burden of proof that he remained totally disabled after ten (10) years, and denied reinstatement of his terminated benefits. The basis for jurisdiction in the First Circuit Court of Appeals is 29 U.S.C. § 1001 et seq.

## REASONS FOR GRANTING THE PETITION

The within decision of the First Circuit Court of Appeals, if allowed to stand without the intervention of this court, will make it impossible for any truly disabled employee covered by an ERISA plan to collect the ERISA benefits to which he or she is otherwise lawfully entitled. ERISA which was intended to protect the disabled employee instead and with the encouragement of these decisions, has evolved into a device which now rewards the insurance industry with unjust windfalls and unjust enrichment for denying disability benefits to the legitimately disabled employee. As a further result, the insurance industry now administers short-term disability plan benefits as well.

## CONCLUSION

The Court should grant the Petition for a Writ of Certiorari and reverse the decision of the First Circuit Court of Appeals.

Respectfully Submitted

BERNARD A. KANSKY, ESQ
FOR PETITIONER
***ADMITTED: 5/21/1980***
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(617) 227-2020

## CERTIFICATES

I as undersigned counsel for the Petitioner, Edward F. Richards, do hereby certify that I have forwarded appropriate number of copies of this Petition to opposing counsel of record, Edward P. O'Leary, Esq., 155 Federal ST., Suite #1700, Boston, MA 02110 (617) 695-2330,also by postage prepaid U.S. Mail; that this document is 5 pages or less of content; and that this document contains less then 1,500 words.

Dated: May 19, 2010. BERNARD A. KANSKY, ESQ.

# APPENDIX

172

(2)

Supreme Court, U.S.
FILED

10-449 MAY 19 2010

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

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EDWARD F. RICHARDS
Petitioner

v.

HEWITT ASSOCIATES, formerly known as Compaq formerly known as Digital Equipment Corp.; INTERNAL DISABILITY PLAN; PRUDENTIAL INSURANCE COMPANY OF AMERICA, also known as Prudential Financial; TARA JOHNSON, Adjuster,
Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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# APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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FOR PETITIONER
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## APPENDIX TABLE OF CONTENTS


| | Pages |
|---|---|
| 1. February 18, 2010 Denial of Petition For Rehearing and Rehearing En banc ..... | App. 1 1B. |
| 2. January 19, 2010, Judgment entered by the Circuit Court of Appeals, First Circuit... | App. 2 - 2B |
| 3. Opinion and Memorandum of Circuit Court of appeal, First Circuit of January 19, 2010..... | App. 3. |

App. 1

United States Court of Appeals
For The First Circuit

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No. 08-2538

EDWARD F. RICHARDS

Plaintiff-Appellant

v.

HEWITT ASSOCIATES, formerly known as Compaq formerly known as Digital Equipment Corp.; INTERNAL DISABILITY PLAN; PRUDENTIAL INSURANCE COMPANY OF AMERICA, also known as Prudential Financial; TARA JOHNSON, Adjuster

Defendants-Appellees

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Before
Lynch, Chief Justice
Torruella, Boudin, Stahl
Lipez and Howard,
Circuit Judges

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ORDER OF COURT
**Entered: February 18, 2010**

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By The Court:

/s/Margaret Carter,Clerk

App. 2.

**United States Court of Appeals**

**For the First Circuit**

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No. 08-2538

EDWARD F. RICHARDS,

Plaintiff, Appellant,

v.

HEWLETT-PACKARD CORPORATION, formerly COMPAQ, formerly DIGITAL EQUIPMENT CORP.; INTERNAL DISABILITY MANAGEMENT, GI LONG-TERM DISABILITY PLAN; and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA a/k/a PRUDENDTIAL FINANCIAL,

Defendants, Appellees.

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**JUDGMENT**

Entered: January 19, 2010

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Margaret Carter, Clerk

cc: Mr. O'Leary and Mr. Kansky

App. 3.

# United States Court of Appeals

## For the First Circuit

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No. 08-2538

EDWARD F. RICHARDS,

Plaintiff, Appellant,

V.

HEWLETT-PACKARD CORPORATION, formerly COMPAQ, formerly DIGITAL EQUIPMENT CORP.; INTERNAL DISABILITY MANAGEMENT, GI, LONG-TERM DISABILITY PLAN; and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA a/k/a PRUDENTIAL FINANCIAL,

Defendants, Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF

MASSACHUSETTS

[Hon. Nathaniel G. Gorton, U.S. District Judge]

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App. 4.

Before

Lipez, Stal and Howard,

Circuit Judges.

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Bernard A. Kansky, with whom Kansky & Associates was on brief, for appellant.

Edward P. O'Leary, with whom Fitzhugh & Mariani LLP was on brief, for appellees.

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January, 19, 2010

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**HOWARD, Circuit Judge.** In this ERISA[1] matter, Edward Richards appeals from an adverse summary judgment ruling which upheld the termination of his long-term disability benefits by

[1] Employee Retirement Income Security Act of 1974, 29 U.S.C.§1001 et seq.

Prudential Insurance Co. of America ("Prudential").[2] We affirm.

## I. BACKGROUND

### A. The Policy

From May 1984 until January 1991, Richards was employed by Digital Equipment Corporation ("DEC") as a software engineer.[3] As a benefit of his employment with DEC Long-Term Disability Plan ("the Plan"). Pursuant to the Plan, Prudential managed and administered disability claims filed by DEC employees. The Plan is governed by ERISA.

To be eligible for long-term disability benefits under the Plan, a claimant must have suffered a

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[2]There were several named defendants, including Richards' former employer and an individual defendant is no longer a party. We refer to the remaining defendants/appellees collectively as "Prudential." both for convenience and because the insurer is the real party in interest in this litigation.

[3] Digital was subsequently acquired by appellee Hewlett Packard.

sickness or accidental injury rendering him unable "to perform, for wage or profit, the material and substantial duties of his occupation." After twenty-four months, eligibility hinges on whether the claimant is "able to perform for wage or profit the material and substantial duties of any job" for which the claimant is reasonably fit by education, training or experience (emphasis added).

B. Richards' claim, termination and internal appeals

Richards applied for long-term benefits in May 1991, at the age of thirty-nine. He cited chronic fatigue immune dysfunction and fibromyalgia as the causes of his disability, which left him unable to work after January 15, 1991. Prudential accepted Richards' claim in October 1991 and commenced paying benefits retroactive to July

1991. In 1992 Richards was awarded Social Security disability benefits.

Since the Plan required proof of ongoing disability as a condition to continued receipt of benefits, Prudential regularly required Richards to provide a statement of his current condition and releases enabling Prudential to obtain his medical records. Although Richards occasionally balked – at least once referring to the requests as "harassment" – he uniformly complied with Prudential's requests, and his benefits continued apace.

In January 2001, Prudential, using releases provided by Richards a month earlier, requested medical records from three treating physicians Richards had previously identified in his periodic submissions to Prudential. The records request

covered the period from January 1999 forward. On February 5, 2001, one of the physicians, Dr. Carol Englender, reported that she had not seen Richards in her office since prior to January 1999. A few weeks later, in response to Dr. Englender's information, and consistent with plans to review Richards' claim developed in March 2000, Prudential sought an independent review of Richards' claim from Dr. Gwen Brachman, whose practice included internal medicine, rheumatology and occupational medicine. After reviewing Richards' medical history, Dr. Brachman submitted a report to Prudential, concluding that although Richards qualified for a diagnosis of fibromyalgia, he was not physically impaired from performing the essential functions of a sedentary job. Relying on

Dr. Brachman's report, Prudential informed Richards on March 26, 2001 that he was no longer eligible for long-term disability benefits and that payments would cease as of June 1, 2001.

The letter terminating Richards' benefits also contained information about the appeals process, as did a follow-up letter sent approximately on month later. Over the next three years, Richards contacted Prudential on numerous occasions. Many of the calls were requests to immediately reinstate his benefits while he prepared his appeal. Still other calls contained accusations by Richards of Prudential's professional malfeasance and threats to bring Prudential's alleged misconduct to the attention of entities ranging from the federal government to television exposé programs.

On July 26, 2004, Richards submitted a formal written appeal of Prudential's March 2001 decision. He set forth three arguments for reinstatement of his benefits: first, that Dr. Brachman was not only unqualified to review his disability, but that she also used improper evaluation techniques and made false statements in her review; second, that Prudential should have deferred to the opinions of Richards' treating doctors; and third, that Prudential should have given deference to the 1992 decision of the administrative law judge who awarded Richards Social Security disability benefits. Prudential denied the appeal by letter dated September 28, 2004.

Responding to Richards' specific complaints, Prudential noted that Dr. Brachman specialized in

Occupational rhematology, and was thus qualified to review Richards' medical records, his diagnosis of fibromyalgia and chronic fatigue, and to offer an opinion on his ability to work. Prudential further noted that it did take the Social Security determination into consideration, but that Prudential's determinations are independent from the agency's. Prudential also indicated that it had reviewed Richards' records before making its original determination in 2001, and since three years had passed, it also considered additional records that Richards had provided since the decision. Finally, Prudential buttressed its decision by pointing to a transferable skills analysis that concluded that Richards could perform a number of sedentary occupations which fit within his education, training or experience.

In response to the September 28, 2004 letter, Richards submitted a letter and additional records from one of his treating physicians, Dr. Mark Hryniewich, and requested that Prudential again review its decision. On February 8, 2005, following review of the additional materials, Prudential again informed Richards that its original decision was correct.

The February 2005 letter also instructed Richards about his rights to pursue further appeals. Richards availed himself of this opportunity by submitting his second written appeal in August 2005. This appeal set forth three chief claims. First, Richards accused Prudential of ignoring Dr. Hryniewich's opinion that Richards' fibromyalgia had left him chronically disabled. Richards also protested the

fact that Prudential did not contact Dr. Hryniewich personally. Finally, Richards claimed that Prudential's benefit termination notification was legally deficient because it lacked detailed instructions about the particular information Richards would need to supply to get his benefits reinstated.

In response, Prudential conducted another review, and again affirmed the decision to terminate Richard's benefits. Relying on a medical record review performed by its Medical Director, Dr. Richard Day, Prudential reiterated its findings that Richards could perform the duties of a sedentary job for which he was qualified. The denial letter also noted that previous neurological assessments Richards had undergone were "completely normal, as were

laboratory findings, and there were no rheumatologic laboratory or physical findings consistent with synovitis or an inflammatory process."[4] Additionally, Prudential informed Richards of Dr. Day's opinion that any treatment he was receiving for chronic fatigue syndrome was incomplete, given the lack of cognitive behavioral therapy.[5]

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[4] "Synovitis" is inflammation of fluid membranes in certain of the body's joint cavities and tendon sheaths. Stedman's Medical Dictionary 1773 (27th ed. 2000)

Dr. Day's report, Prudential also referred back to the transferable skills analysis performed the previous year, which identified, a number of sedentary positions suitable for Richards, given what Prudential contended was his residual functioning capacity.

Richards, this time through counsel, availed himself of Prudential's final level of appeal on January 30, 2006. In addition to repeating the claim that Richards was in fact totally disabled from performing any occupation, the appeal alleged that the previous rejection – the September 29, 2005 decision – "did not set forth

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[5] Dr. Day also referred to a note from a Dr. O'Leary, which strongly opposed Richards' claim of disability. However, Dr. Day incorrectly referred to O'Leary's note as being dated April 2001, when the record reflects an actual date of April 1991. While this discrepancy might weaken somewhat the foundation of Dr. Day's opinion, it does not significantly undercut it. We address later the relevance of Dr. O'Leary's report within the overall context of the administrative record.

with the required specificity" the reasons that Richards' benefits were discontinued. Also, Richards took issue with Dr. Day's reference to cognitive behavior therapy, likening it to "years ago, [when] epileptics were locked away in institutions for the mentally insane." Finally, Richards' attorney asked to meet with Prudential's appeal committee prior to its decision.

Although the substantive decision on Richards' last appeal was still moths away, Prudential responded quickly to his attorney's missive. In a letter dated February 6, 2006, Prudential expressed its view that its various benefit termination letters adequately detailed the reasons for its decisions. Specifically, Prudential noted that its letters cited policy provisions, medical reviews and vocational assessments.

Additionally, Prudential rejected Richards' demand that it contact his physicians, as it was not contractually obligated to do so and because it was unnecessary given the information already in his medical file. Further, Prudential rejected Richards' attorney request to appear before the appeals committee, as that committee "doesn't 'meet' with claimants or their representatives; rather the panel provides third and voluntary level of appeal review."

Prudential originally set an April 1, 2006 deadline for Richards to submit materials in support of his final appeal. Due to various communication breakdowns regarding deadlines, Prudential extended the deadline to June 2006. Richards used the additional time to supplement

the record[6]. In the letter dated June 5, 2006, on day before the deadline, Richards attorney submitted a report from Dr. Hryniewich, dated the same day, in which he opined that Richards "has been totally and permanently disabled.from engaging in and maintaining any gainful employment activity since 1991, up to and including the present, and further, it is likely that his total an permanent disability will continue for the foreseeable future." Dr. Hryniewich noted that Richards "tested positive for fibromyalgia," and that while symptoms could be treated with pain medication, side effects made his return to gainful

[6] The record also reflects that communication between Richards and Prudential had become further strained; phone logs contain notations of accusations by Richards during frequent phone calls, to which Prudential responded by communicating with him only in writing.

employment impossible.[7]

During the pendency of Richards' final appeal, Prudential sought additional medical reviews from two rheumatologists. One of these reviews, from Dr. Paul Howard, took place after receipt of Dr. Hryniewich's June 5 report. On July 18, 2006, Prudential informed Richards' attorney of its determination that the decision to terminate Richards' benefits in 2001 was appropriate.

After rehashing some of the lengthy procedural history of the case, the denial letter detailed the findings of Dr. Howard and Dr. Dayton Dennis Payne, who reviewed Richards' records in April

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[7] The letter from Dr. Hryniewich was the only new medical evidence submitted to Prudential. Several other letters were little more than attacks on Prudential and its medical reviewers, or efforts "to make Prudential aware" of damage awards against other insurance companies, seemingly as a warning.

2006. Dr. Payne's report noted Richards' diagnoses of chronic fatigue syndrome, chronic fatigue immune dysfunction syndrome and fibromyalgia. He also noted Richards' myriad other symptoms, including short-term memory issues, irritable bowel syndrome, depression, and possible bursitis. Dr. Payne found that Richards' records showed that his symptoms had remained "essentially unchanged" over the fifteen years since he began receiving benefits, and also noted the statements by others that he would "never be able to return to gainful employment."

Dr. Payne also determined, however, that he could find no evidence of "destructive rheumatic findings," or that Richards had limitation of motion in his joints, weakness or atrophy, or specific organ system abnormalities. In light of

these findings, Dr. Payne concluded that : 1) the records did not support a finding of functional impairment existing from June 2001 forward; 2) the records contained no objective evidence of any disease process that would be expected to lead to any restrictions or limitations; 3) while there was no evidence of malingering, no physical examination or testing procedure revealed objective evidence of impairment; and 4) because the objective findings did not support any degree of restriction or limitations, Richards would be expected to have age-appropriate functional capacity.

Dr. Howard's report, dated July 6. 2006, noted that Richards' rheumatological symptoms between 2001 and 2006, were consistent with fibromyalgia, but that the resulting functional

impairments were "mild in nature." Dr. Howard noted the 1991 opinions from Dr. O'Leary and Dr. Englender that posited that Richards' symptoms should allow him to eventually return to work. Dr. Howard also pointed out that a comprehensive physical examination conducted by Dr. Hryniewich in 2001 contained normal neurological findings, with no indication of any reported physical examination abnormalities. Regarding Dr. Hryniewich's June 2006 letter, Dr. Howard implied that its conclusion of total disability was somewhat suspect given that a November 2005 examination yielded normal results, other than a complaint of foot pain. Additionally, Dr. Howard noted that while Dr. Hryniewich's letter cited side-effects of pain medication, the medical records themselves

lacked any reference to side effects. Moreover, Dr. Howard suggested that Richards' non-compliance with recommended exercise programs deprived him of an opportunity to improve his functional capacity.

Relying on what he described as an "absence of any abnormalities by radiological study, laboratory studies and...repeated physical examinations," Dr. Howard expressed his opinion that Richards, despite a mile degree of impairment," would be able to perform sedentary work involving sitting, walking occasionally, standing frequently, lifting ten pounds frequently (occasionally twenty), working at a desk, and using his hands and fingers without restriction.

As noted, Prudential, relying in large measure on the opinions of Drs. Payne and Howard,

rejected Richards' final appeal, concluding that "the medical evidence overwhelmingly supports that Mr. Richards has been capable of returning to work on a full time basis in both his own occupation as well as in an alternate, gainful occupation since at least June 01, 2001."

C. District court proceedings

Having exhausted this administrative remedies, Richards filed suit in federal district court, seeking reinstatement of benefits retroactive to June 2001, attorneys fees, and roughly $43,000 in sanctions against Prudential for failing to provide certain documents during the administrative process. In due course, the parties filed cross-motions for summary judgment, which were referred to a

magistrate judge for a report and recommendation ("R & R").

Following a hearing, the magistrate judge recommended that Prudential motion be granted and that Richards' be denied. In the course of reaching its conclusion, the fifty-six page R & R rejected Richards' arguments that Dr. Brachman was not qualified to evaluate Richards' records, that Prudential did not provide him with enough information about he benefit termination, and that Prudential improperly required Richards to supply "objective medical evidence" in support of his claim. Moreover, the R & R refused Richards' entreaties to give special weight to the Social Security Administrations favorable benefit determination and the opinion of Dr. Hryniewich, as Richards' treating physician. The district court

judge adopted the R & R over Richards' objections and denied multiple motions for reconsideration. This appeal followed.

## II. ANALYSIS

### A. Standard of review

Prior to addressing the substance of Richards' grievances, the district court ruled in his favor on an important preliminary issue. The parties had disputed the applicable standard of review. Prudential sought to have the court review the administrative record for abuse of discretion, while Richards urged a more searching de novo review. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) ("[A] denial of benefits challenged under [29 U.S.C.] § 1132 (a) (1) (b) is to be reviewed under a de novo standard unless

benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits...").  After a thorough review of cases addressing identical policy language from this circuit and elsewhere, the court concluded that application of the de novo standard of review was warranted.  Prudential does not challenge this ruling.[8]

Our task is to independently weigh the facts and opinions in the administrative record to determine whether the claimant has met his burden of showing that he is disabled within the meaning of the policy.  We grant no deference to the administrators' opinions or conclusions.

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[8] The district court also denied Richards' motion to supplement the record with an affidavit in which he described his condition. As Richards contested this decision only in his reply brief, it is waived. See Cunningham v. Nat'l City Bank, 588 F.3d 49, 54 n.6 (1st Cir. 2009) (arguments not raised in appellant's opening brief are waived).

Orndorf v. Paul Revere Life Ins. Co., 404 F. 3d 510, 518 (1st Cir. 2005). In other words, we stand in the shoes of the administrator to "determine... whether the administrative decision was correct." Few v. Liberty Mutual Ins. Co., No. 06-CV-00427-JL, 2009 WL 756211 (D.N.H. March 19, 2009); cf. Leahy v. Raytheon Co., 315 F. 3d 11, 19 (1st Cir. 2002) (under arbitrary and capricious review, reviewing court may not substitute its opinion for that of the plan administrative record and represents an ultimate conclusion as to a claimant's disability to be drawn from the facts, "summary judgment is simply a vehicle for deciding the issue." Orndorf, 404 F.3d at 517. Accordingly, the non-moving party is not entitled to the usual inferences in its favor. Id.

In sum, "[o] ur guiding principle in conducting de novo review...is that the plaintiff bears the burden of proving he is disabled." Id. At 518-19. Therefore, in the context of the policy definitions applicable here, Richards' burden is to prove that he is "unable to perform for wage or profit the material and substantial duties of any job" for which he is reasonably fit by education, training or experience.

B. Appellant's claims

Richards makes three arguments on appeal. First, he claims that no weight was given to Dr. Hryniewich's opinions. Second, he asserts error in the failure to give "any weight" to the Social Security Administration's ruling in his favor. Finally, he argues that it was "error for the court to adopt the opinion of a paper consulting

physician who proffered a psychiatric condition to the plaintiff" without justification. We address these arguments in turn.

1. Dr. Hryniewich's opinions

Richards complains that the district court did not give any weight to Dr. Hryniewich's opinions. Since we are reviewing the administrator's decision, we construe this argument as though it were directed at Prudential. Regardless, Richards' complaint about the alleged exclusion of Dr. Hryniewich's record falls short of the mark. For example, he argues that references to Hryniewich's notes were absent from Dr. Brachman's 2001 report. Our review of the nearly 1,000-page administrative record suggests otherwise. Dr. Brachman's report explicity mentions review of records from Richards' visits to

the Fallon Clinic in Massachusetts. Included among these records were office notes from several visits with Dr. Hryniewich in 1997, 1999, and 2000 as well as Attending Physician's Statements from 1997 and 1999 in which Dr. Hryniewich informed Prudential of Richards' fibromyalgia and chronic fatigue, and stated that Richards' ability to perform work duties was "unknown." Moreover, as previously noted, Dr. Hryniewich's 2006 conclusion that Richards was disabled from any work was addressed by Dr. Howard during the final level of appeal.

A broader reading of Richards' argument suggests that his actual grievance is that Dr. Hryniewich's conclusions should have been given controlling weight, especially when compared to the doctors who reviewed Richards' record without

examining him. This argument is contrary to existing law, as "the opinion of the claimant's treating physician, which was considered, is not entitled to special deference." Ordorf, 404 F. 3d at 526 (citing Black & Decker Disability Plan v. Nord, 538 U.S. 822, 831 (2003)).[9]

In the final analysis, Dr. Hryniewich's opinions provide a shaky foundation for Richards' claim. First, his descriptions in 1997 and 1999 of Richards' employment prospects as "unknown" is at odds with his later pronouncements that Richards was disabled from any employment. Similarly, office notes from 2001 and 2005

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[9] By contrast, treating physicians' opinions are ordinarily accorded deference in Social Security disability proceedings. See Morales-Alejandro, 486 F. 3d at 700 n.7 (Citing 20 C.F.R. § 404.1527 (d) (2)). That deference does not extend, however, to a physician's opinion – such as the one offered by Dr. Hryniewich – that a claimant is unable to work, as such an opinion is not a medical one. Id.

contain no reference to disability from fibromyalgia.

Against this backdrop, we reject Richards' arguments regarding the adequacy of the weight given to Dr. Hryniewich's opinions.

2. Social Security disability determination

After Richards' initial application for Social Security disability benefits was denied in 1991, and administrative law judge ruled in his favor in October 1992. Richards argues that it was error to not give "any weight" to the fact that he was awarded Social Security disability benefits due to fibromyalgia and chronic fatigue immune dysfunction. We disagree with both the factual premise of the argument--that no weight was given --and its implied legal conclusion -- that the

Social Security decision inexorably leads to reversal of Prudential's decision.

As a factual matter, the record suggests that Prudential did not ignore Richards' receipt of Social Security benefits. To the contrary, in rejecting Richards' first request for reconsideration in 2004, Prudential stated that its determinations "are independent from those of the Social Security Administrations [sic] although we will review and consider documentation concerning their [sic] decisions."[10]

Richards fares no better when the legal underpinnings of his argument are examined. Similar to his argument regarding his treating physician, Richards seems to suggest that the Social Security determination is entitled to a high

[10] The district court made a similar pronouncement.

degree of deference. However, in Pari-Fasano v. ITT Hartford Life and Accident Insurance Co., we held that "benefits eligibility determinations by the Social Security Administration are not binding on disability insurers." 230 F.3d 415, 420 (1st Cir 2000). While the Social Security determination might be relevant to an insurer's decision, "it should not be given controlling weight except perhaps in the rare case in which the statutory criteria are identical to the criteria set forth in the insurance plan." Id. Here, Richards has not attempted a comparison between the two sets of criteria and has thus waived that strand of argument. See United States v. Zannino, 895 F.2d 1, 17, (1st Cir. 1990). Even if we were to ignore the waiver, however, the administrative law judge's ruling on Richards' application for

disability benefits contains the following findings: " The claimant retains the residual functioning capacity for less than a full range of sedentary work activity" (emphasis added). Given that, in the context of this case, the policy at issue requires Richards to prove that he is disabled from all sedentary work, a finding that he retains the capacity for "less than a full range" of such work hardly bolsters his case.[11] Accordingly, we find no merit to Richards' Social Security-based argument.

3. "Paper consulting physicians"

Richards' final argument is targeted at both the specific opinion of Dr. Brachman and, more

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[11] We also note that the Social Security award was made in 1992, while Prudential's termination occurred nine years later. Although Richards points out that only Prudential terminated his benefits, he does not specify whether, or to what extent, his Social Security claim was reviewed in the years following the 1992 decision.

generally, at the use of non-examining physicians to review claimant files. As to the latter, Richards argues that the policy language giving Prudential the right to have a claimant undergo a physical examination somehow limits Prudential to the use of physical exams.[12] We do not share this strained reading of the policy language, for which Richards has provided no legal support.[13] Moreover, we have squarely held that an insurer is not required to physically examine a claimant, and that benefit determination may be based on

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[12] Under the section captioned "Claim Rules," the Plan provides that "Prudential, at its own expense, has the right to examine the person whose loss is the basis of the claim. Prudential may do this when and as often as is reasonable while the claim is pending."

[13] Richards invokes the doctrine of contra proferentem, according to which ambiguous policy terms must be strictly construed against the drafter during a de novo review. See Stamp v. Metropolitan Life Ins. Co., 531 F.3d 84, 93 (1st Cir.), cert. denied, 129 S. Ct. 636 (2008); Balestracci v. NSTAR Elec. And Gas Corp., 449, F.3d 224, 231 n.2 (1st Cir. 2006). Here, however, we find no ambiguity in the policy provisions giving Prudential the right to have Richards examined, such that it should be read as a requirement.

reviews of medical records. Orndorf, 404 F.3d at 526. Additionally, as in Orndoff, "this is simply no a case where the only medical evidence ran in [claimant's] favor, thus casting into doubt a denial of benefits." Id. In fact, while the evidence may have supported the diagnoses of fibromyalgia or chronic fatigue immune dysfunction, every reviewing, board-certified doctor, with the exception of Dr. Hryniewich, found that Richards could perform a sedentary job which he was reasonably fit by education, training or experience.[14]

As to Dr. Brachman's opinion, Richards first takes issue with her medical qualifications. We

[14] As previously noted, Dr. Hryniewich's definitive statements regarding Richards' incapacity came several years after the initial denial and were arguably inconsistent with his pre-determination opinions regarding Richards' employment prospects, which he at least twice described as "unkown."

are not persuaded. The record reflects that Dr. Brachman specializes in occupational medicine and rheumatology, and Richards offers no evidence to the contrary.

Next Richards argues that Brachman improperly ascribed a psychiatric condition – depression – to him without any basis. He then asserts that Prudential used this finding to discontinue his benefits by relying on the Plan's twenty-four month maximum payment period for disabilities "caused in whole or part by a mental health issue." Even assuming that Dr. Brachman's mental health conclusion is overstated,[15] Richards' argument nevertheless

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[15] There are, in fact, references to depression in the record dating back to the early 1990s. In Dr. Brachman's opinion, depression can lead to a magnification or exaggeration of fibromyalgia symptoms. While Richards disputes this conclusion, his brief contains no refutation to the articles upon which Dr. Brachman relied in her report.

fails for two related reasons. First, while Dr. Brachman in her report discussed the medical record evidence of depression in Richard's history, she also addressed the lack of evidence of physical impairment, including synovitis, deformity, or decreased range of joint motion. She also noted the lack of any inflammatory vascular desease or neurocognitive impairment. Second, Prudential did not terminate Richards' benefits on the ground that he had exhausted them under the mental health provisions of the Plan. Instead, Prudential explicity stated that it was evaluating whether his "current physical condition prevented [him] from performing any occupation." In other words, regardless of Dr. Brachman's reference to Richards' mental health

history, the requirement that he prove his then – current physical disability remained.

Finally, to the extent that Richards argues that Dr. Brachman did not review the entirety of his medical history, we note that "the denial letter need not detail every bit of information in the record; it must have enough information to render the decision to deny benefits susceptible to judicial review." Orndorf, 404 F.3d at 526. Dr. Brachman's report and Prudential's termination letter easily satisfy this standard.[16]

## III. CONCLUSION

We are not without sympathy to Richards' plight. However, the dispute is this case is not over whether Richards is afflicted with

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[16] One possible basis for Richards' view is that the letter to him from Prudential lists certain records as "included" among those sent to Dr. Brachman, while Brachman's report contains a much larger list of records she actually reviewed.

fibromyalgia or chronic fatigue immune dysfunction. And while termination of benefits after ten years of payments is a harsh outcome, it is on that Prudential was legally entitiled to pursue within ERISA's strictures. The sole issue before us is whether Richards met his burden of showing that these conditions rendered him unable to perform any job for which he is qualified. Based on the record before us, we agree with the administrator and the district court that he has failed to meet his burden. The judgment of the district court is therefore **affirmed.**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD F. RICHARDS,
Plaintiff,

v. CIVIL ACTION NO.
07-10574-NMG

HEWLETT-PACKARD CORPORATION, formerly COMPAQ, formerly DIGITAL EQUIPMENT CORP., INTERNAL DISABILITY MANAGEMENT, GI, LONG TERM DISABILITY PLAN, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA a/k/a PRUDENTIAL FINANCIAL, AND TARA JOHNSON, ADJUSTER,
Defendants,

JUDGMENT

GORTON, D.J.

In accordance with the Court's adoption on 9/30/08 of the Magistrate Judge's Report and Recommendation of summary judgment in the above-entitled action, it is hereby **ORDERED:**

**Judgment for the defendants.**

Date: 8/24/2009 By the Court,

/s/Diep Duong
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD F. RICHARDS,
Plaintiff,

v. CIVIL ACTION NO.
07-10574-NMG

HEWLETT-PACKARD CORPORATION, formerly COMPAQ, formerly DIGITAL EQUIPMENT CORP., INTERNAL DISABILITY MANAGEMENT, GI, LONG TERM DISABILITY PLAN, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA a/k/a PRUDENTIAL FINANCIAL, AND TARA JOHNSON, ADJUSTER,
Defendants,

REPORT AND RECOMMENDATION RE: DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT (DOCKET ENTRY ##21 & 22) AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DOCKET ENTRY # 29)

ORDER RE:
DEFENDANTS' MOTION TO STRIKE (DOCKET ENTRY #33); DEFENDANTS' MOTION TO ESTABLISH ABUSE OF DISCRETION (DOCKET ENTRY #19); AND PLAINTIFF'S MOTION FOR DE NOVO REVIEW (DOCKET ENTRY #17)

September 12, 2008

## CERTIFICATE OF SERVICE

I, the undersigned counsel for the Petitioner, Edward F. Richards, do hereby certify that a appropriate copies of the within Appendix filed in support of the Petitioner's Petitioner For Writ of Certiorari was appropriately forwarded to opposing counsel of record, by hand delivery or by first-class postage prepaid United States Mail on the month day and year set forth below.

Date: July 20, 2010

BERNARD A. KANSKY , Esq.
COUNSEL FOR PETITIONER
RICHARDS

172

(3)

Supreme Court, U.S.
FILED

MAY 19 2010

OFFICE OF THE CLERK

NO. 10-449

IN THE

SUPREME COURT OF THE UNITED STATES

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EDWARD F. RICHARDS,
Petitioner

v.

HEWITT ASSOCIATES, formerly known as Compaq formerly known as Digital Equipment Corp.; INTERNAL DISABILITY PLAN; PRUDENTIAL INSURANCE OF AMERICA, also known as Prudential Financial; TARA JOHNSON, ADJUSTER,

RESPONDENTS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APLLEALS FOR THE FIRST CIRCUIT

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# APPENDIX II FOR PETITION FOR WRIT OF CERTIORARI

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**APPENDIX II**

TABLE OF CONTENTS

Pages

1. ORDER OF JUDGMENT IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS ..... APP. 43

2. REPORT AND RECOMMENDATION RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, ET ALS... ..... APP. 44 – APP. 140

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD F. RICHARDS,
Plaintiff,

v. CIVIL ACTION NO.
07-10574-NMG

HEWLETT-PACKARD CORPORATION, formerly COMPAQ, formerly DIGITAL EQUIPMENT CORP., INTERNAL DISABIILITY MANAGEMENT, GI, LONG TERM DISABILITY PLAN, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA a/k/a PRUDENTIAL FINANCIAL, AND TARA JOHNSON, ADJUSTER,
Defendants,

JUDGMENT

GORTON, D.J.

In accordance with the Court's adoption on 9/30/08 of the Magistrate Judge's Report and Recommendation of summary judgment in the above-entitled action, it is hereby **ORDERED:**

**Judgment for the defendants.**

Date: 8/24/2009

By the Court,

/s/Diep Duong
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD F. RICHARDS,
Plaintiff,

v. CIVIL ACTION NO.
07-10574-NMG

HEWLETT-PACKARD CORPORATION, formerly COMPAQ, formerly DIGITAL EQUIPMENT CORP., INTERNAL DISABIILITY MANAGEMENT, GI, LONG TERM DISABILITY PLAN, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA a/k/a PRUDENTIAL FINANCIAL, AND TARA JOHNSON, ADJUSTER,
Defendants,

REPORT AND RECOMMENDATION RE: DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT (DOCKET ENTRY ##21 & 22) AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DOCKET ENTRY # 29)

ORDER RE:
DEFENDANTS' MOTION TO STRIKE (DOCKET ENTRY #33); DEFENDANTS' MOTION TO ESTABLISH ABUSE OF DISCRETION (DOCKET ENTRY #19): AND PLAINTIFF'S MOTION FOR DE NOVO REVIEW (DOCKET ENTRY #17)

September 12, 2008

BOWLER, U.S.M.J

Plaintiff Edward F. Richards ("Richards") filed this action against defendants[1] Hewlett-Packard Corporation ("HP"), Hewitt Associates ("Hewitt"), The Prudential Insurance Company ("Prudential"), Internal Disability Management, GI, ("Disability Management") and the Long-Term Disability Plan ("Plan") (collectively: "defendants") seeking a redetermination of the denial of his long term disability benefits under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 ("ERISA"). In the complaint, Richards requests: damages approximating the amount of benefits due to him in the sum of $102,504.83; prejudgment and post judgment interest at the rate of 12% per year; damages in the sum of

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[1] Tara Johnson ("Johnson"), a former defendant, filed a motion to dismiss for failure to state a claim on April 30, 2007.

$43,230 for defendants' breach of the duty of disclosure pursuant to 29 U.S.C. § 1132 (a)- (c); attorneys' fees and costs, and an award of sanctions in the amount of $10,000,000. (Docket Entry #1).

On January, 31, 2008, HP and Hewitt filed a motion for summary judgment (Docket Entry # 21) and Prudential, Disability Management and the Plan filed a motion for summary judgment (Docket Entry #22). Richards submitted an opposition (Docket Entry # 21 & 22) on March 7, 2008. Richards filed a motion for summary judgment (Docket Entry #29) on February 19, 2008. Defendants opposed Richards' summary judgment motion on March 5, 2008. (Docket Entry #34).

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(Docket Entry #9). The court allowed the motion on August 14, 2007.

On February 28, 2008, defendants filed a motion to strike certain documents offered by Richards. (Docket Entry #33). Richards filed an opposition (Docket Entry # 35) to the motion to strike (Docket Entry #33) on March 7, 2008. On May 19, 2008 this court held a hearing and took defendants' summary judgment motions (Docket Entry ##21 & 29) and Richards' summary judgment motion (Docket #19) under advisement. Defendants' motion to strike (Docket Entry #33) and motion to establish abuse of discretion (Docket Entry #19) as well as Richards' motion for de novo review (Docket Entry #17) are also ripe for review.

I. MOTION TO STRIKE (DOCKET ENTRY # 33

Defendants move to strike Richards' motion for summary judgment (Docket Entry #29) and opposition to defendants' motion to establish abuse of discretion as the standard of review (Docket Entry 28) because the filings are both untimely and prejudicial. (Docket # 33). Defendants also move to strike Richards' affidavit submitted in support of his motion for summary judgment (Docket Entry # 32) because it is not part of the administrative record. (Docket # 33). Finally, defendants move to strike Richards' statement of undisputed facts (Docket # 30) because it "fails to comply with the Federal Rules of Civil Procedures and Local Rule 56.1." (Docket Entry # 33). Richards opposes excluding these items from consideration (Docket Entry #35).

Parties in an ERISA benefits action are usually not allowed to supplement the administrative record, which the plan administrator used to base its final decision. See Orndorf v. Paul Revere Life Ins. Co., 404 F.3d 510, 520 (1st Cir. 2005); Liston v. Unum Corp. Officer Severance Plan, 330 F.3d 19, 26 (1st Cir. 2003). Courts generally do not permit supplementary because it is contrary to "the interests in finality and exhaustion of administrative procedures required by ERISA to shift the focus from [the final administrative decision] to a moving target by presenting extra-administrative record evidence going to the substance of the decision." Orndorf, 404 F.3d at 519. Accordingly, there must be very good reason "to overcome the strong presumption that the record of review is limited to the record before the

administrator" in order for a court to allow any supplementation of the record. Liston, 330 F.3d at 519; Liston, 330 F.3d at 23. Moreover, whether the standard of review is de novo or arbitrary and capricious, the evidence to be disseminated by the court is limited to the administrative record. See Orndorf, 404 F.3d at 519; Liston 330 F.3d at 23.

Richards cites this court to only one case, Frederich v. Intel Corp., 181 F.3d 1105, 1111 (9th Cir. 1999) (quoting Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan, 46 F. 3d 938, 944 (9th Cir. 1995)), to buttress his argument. The court in Frederich, a Ninth Circuit opinion, held that additional evidence may be admitted when it is necessary to conduct an adequate de novo review. Id. Regardless of the standard of review, First Circuit precedent requires that this

court strike Richards' affidavit, as it was not part of the administrative record when Prudential decided Richards' claim. See Orndorf, 404 F.3d at 519; Liston, 330 F3.d at 23.

Defendants additionally move to strike Richards' summary judgment motion, his statement of undisputed facts and his opposition to defendants' motion to establish abuse of discretion as the court's standard of review due to their untimely nature. (Docket Entry # 33). Defendants contend that Richards did not "show cause" and "excusable neglect" for failure to obtain leave prior to the expiration of the deadline to file dispositive motions and the expiration of the 14 day period in LR. 7.1 (b)(2) as required

under Rule 6(b), Fed, R. Viv. P.[2] (Docket Entry # 33). In light of an illness in Richards' counsel's family as well as the lack of demonstrable prejudice to defendants, this court will not strike the foregoing documents. (Docket Entry # 35).

II. DEFENDANTS' MOTION TO ESTABLISH ABUSE OF DESCRETION (DOCKET ENTRY # 19); RICHARDS' MOTION FOR DE NOVO REVIEW (DOCKET ENTRY # 17)

Which standard of review applies to the administrative record in an ERISA action depends upon the discretionary authority accorded to the initial decision maker. See Denmark v. Liberty Life Assur. Co. Of Boston, 481, F.3d 16, 26, (1st Cir.

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[2] Rule 6(b), Fed. R. Civ P., provides, in pertinent part, that:

When...by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion...(2) upon permit the act to be done where the failure to act was the result of excusable neglect.

2007); Leahy v. Raytheon Co., 315 F.3d 11, 17, (1st Cir. 2002). The Supreme Court in Firestone and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989), held that "a denial of benefits challenged under § 1132 (a) (1) (B) is reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Id. at 115.

Richards makes three arguments in support of de novo review, (Docket Entry # 17). First, he claims that Prudential "has stipulated in other litigation, involving its same nationwide ERISA long term disability insurance counsel that the operative plan documents fail to grant to Prudential 'discretion' in its plan administration." (Docket Entry #17) Second, Richards argues that

the employer did not "grant discretion to Prudential in accordance with 19 U.S.C. § 1105(c)." (Docket Entry # 17). Finally Richard argues that the language in the Plan does not grant discretion to the insurer. (Docket Entry # 17).

As an initial matter, however, Richards argues that the defendants are judicially estopped from asserting de novo review based on district court decision in the Ninth Circuit interpreting the Plan's language. (Docket # 17). Richards' reliance on Sullivan v. Prudential Insurance Company of America, 233 F.R.D. 573 (C.D.Cal. 2005), however, is misplaced.

Judicial estoppel can only attach if the estopping position and the estopped position are mutually exclusive and if the responsible party

has succeeded in persuading a court to accept its prior position. Alternative System Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 33 (1st Cir. 2004). Courts often consider whether the party asserting the inconsistent position derives an unfair advantage absent an estoppel and whether judicial acceptance of a party's initial position conferred a benefit on that party. Id. at 33.

Richards does not offer any evidence that the law in the Ninth Circuit concerning ERISA is the same as the law in the First Circuit. (Docket Entry #17). Richards also fails to show that the defendants in this action convinced the court in Sullivan to accept their position, since HP and the Plan were not even defendants in Sullivan. Id. Richards does not provide evidence that absent estoppel, the other defendants (HP and the Plan)

would gain an advantage if allowed to take an alternate position from the one in Sullivan. Id. Finally, Richards fails to show that Prudential's stance in the prior litigation conferred a benefit on Prudential. Rather, it appears that Prudential's actions in Sullivan actually provided plaintiff with a benefit. Id.; (Docket Entry #17). Accordingly, Richards' argument must fail.

Richards next contends Digital did not properly delegate discretionary authority to Prudential and, therefore, this court should use a de novo standard of review. (Docket Entry #17). "[T]he instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities." 29 U.S.C. § 1105 (c) (1). ERISA further provides that "every employee benefit plan shall be established

and maintained pursuant to a written instrument." 29 U.S.C. §1102 (a) (1). The Plan does not designate a plan administrator. (Docket Entry #18, Ex. 1). Digital, now HP, is the Plan's sponsor, since it established and maintained the plan 29 U.S.C. § (16) (B). Accordingly, Digital, Now HP, is the plan administrator. See. 29 U.S.C. § 1002 (16) (A) & (B).

Richards suggests that Prudential discretion to itself" (Docket Entry #17). He argues that Prudential lacks a document, which grants it fiduciary responsibility. (Docket Entry #17). Richards, however, overlooks the Denmark decision which held that "the LTD policy is the 'written instrument' required under 29 U.S.C. § 1102 (a) (1)." Denmark, 481 F.3d at 16. Since an insurance policy can operate as an ERISA plan

instrument, Richards' argument that Prudential lacks such a document, and consequently proper authority, fails. Id.

Finally Richards argues that the language in the Plan is insufficient to confer discretion. (Docket Entry # 17). If "the ERISA plan grants the plan administrator discretionary authority in the determination of eligibility for benefits, the administrator's decision must be upheld unless it is arbitrary, capricious, or an abuse of discretion." Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan, 402 F.3d 67, 74 (1st Cir. 2005). Conversely stated, a de novo standard applies "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone, 489 U.S. at 115. "While the

choice of the standards is clear-cut, there remains considerable debate over what language constitutes a sufficiently clear grant of discretionary authority to transform judicial review from de novo to deferential." Brigham v. Sun Life of Canada, 317 F.3d 72, 81, (1st Cir. 2003). Moreover, "there are no 'magic words' determining the scope of judicial review." Id. at 81.

The relevant language in the Plan provides that, "'Total Disbility' exists when Prudential determines that all of these conditions are met..." (Docket Entry # 18, Ex. 1). Interpreting the same language, the Second Circuit in Nichols applied a de novo standard because the language lacked "sufficient indicia of subjectivity." Nichols v. Prudential Ins. Co. of Am., 406 F.3d 98, 108-109

(2nd Cir. 2005) (applying de novo standard to identical language that "Prudential determines that all of these conditions are met" because it "lacks sufficient indica of subjectivity"). In addition, the listed conditions refer to objective conditions, i.e., the ability "to perform" the substantial duties of the employee's occupation and, after the initial period, the ability to perform the substantial duties of any job for which the employee is "reasonably fitted." See Nichols, 406 F.3d at 109.

Elsewhere and in reference to the benefit limitation applies if the employee's "Total Disability, as determined by Prudential, is caused at least in part by a mental, psychoneurotic or personality disorder." The cut off for a mental disability depends upon the employee's continued

hospitalization. The latter is an objective determination dependent upon the employee's hospitalization. See Nichols, 406 F. 3d at 109.[3]

Even if the conditions did not denote objective criteria, other courts considering language identical or strikingly similar language to "when Prudential determines that all of these conditions are met" likewise find that although such language "vest authority in Prudential, it does not create any discretionary authority, as required by Firestone." Woods v. Prudential Ins. Co. of America, 528 F.3d 320, 322-523 (4th Cir. 2008); accord Nichols, 406 F.3d at 108-109; Herzberger v. Standard Ins. Co., 205 F.3d 327, 332 (7th Cir. 2000) (interpreting same language and reasoning

[3] As explained by the Second Circuit in Nichols, the plan language "gives Prudential the power to make the determination, but the list of specific conditions requires that such power be exercised only in accordance with objective standards." Nichols, 406. F.3d at 109.

that "the mere fact that a plan requires a determination of eligibility or entitlement by the administrator...does not give the employee adequate notice that the plan administrator is to make a judgment largely insulated from judicial review by reason of being discretionary").[4] In

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[4] In support of the position that such language reserves discretionary authority to Prudential, defendants rely on two unpublished decisions in the Sixth Circuit, Noland v. Prudential Ins. Co. of America, 2006 WL 1526087 *4 (6th Cir. June. 2, 2006) ("Prudential's plan reserves for itself the discretion to make factual determinations"), and Miller v. Prudential Health Care Plan, 2002 WL 1284947 *7 (D.Del. June 10, 2002). The court in Miller reasoned that the usual meaning of the word 'determines' implies the exercise of discretion," since the "ability to think or deliberate prior to making a decision is the touchstone of discretion." Miller, 2002 WL 1284947 at *7 (citing Eley v. Boeing Co., 945 F.2d 276, 278 n. 2 (9th Cir. 1991), which found discretion where plan language stated, " The Company shall determine the eligibility of a person for benefits under the plan").

Both of these decisions, however, are unpublished. Under First Circuit LR. 32.3:

> Unpublished or non-precedential opinions of other courts, as defined or understood by those courts, may be cited in the circumstances set forth in subsection (a) (1) above. Such opinions for their persuasive value but not for binding precedent." LR. 32.3 (b). Defendants did not attach copies of the decisions to putting this aside, the Miller and Noland decisions are not binding precedent, see Narragansett Indian Tribe v. Rhode Island, 449 F. 3d 16, 29, (1st Cir. 2006), characterizing reliance on unpublished decision as "misplace" inasmuch as "the opinion has no precedential

other words, simply conferring authority to determine benefits to "an administrator creates the expectation only that such authority will be exercised, not that the administrator will enjoy wide discretion in wielding its authority as well as freedom from searching judicial scrutiny." Woods, 528 F. 3d at 323 (de novo review applied).

Similar to the analysis employed by the Fourth Circuit in Woods, the Seventh Circuit in Herzberger reasoned that language such as "determines" does "not give the employee

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force"), and, accordingly, do not convince this court that discretionary review applies.

Finally, the two Ninth Circuit decisions involving similar language, Eley and Dytrt v. Mountain States Tel. & Tel. Co., 921 F. 2d 889, 894 (9th Cir. 1990), which applied the arbitrary and capricious standard of review because of the use of the word "determine," are not convincing. The language in the plan in Dytrt gave the employer the ability "to construe the terms of the plan" as well as the ability to "to determine eligibility for benefits." Dytrt, 921 F.2d at 894. Both decisions are also devoid of any discussion explaining why the arbitrary and capricious standard applies.

adequate notice that the plan administrator is to make a judgment largely insulated from judicial review by reasoning of being discretionary." Herzberger, 205 F.3d at 332 (applying de novo review); see also Diaz, 424 F.3d at 332 (applying de novo review); see also Diaz, 424 F. 3d at 639 (plan language must "communicate the idea that the administrator not only had broad-ranging authority to access compliance with pre-existing criteria, but also has the power to interpret the rules, to implement the rules, and even the change them entirely").

The weight of authority supported by persuasive reasoning therefore leads to the application of a de novo standard.[5] Finally, as

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[5] In the alterative, even if this court applied the more favorable to the defendant arbitrary and capricious standard of review, the

noted by a number of district courts in this circuit, the First Circuit adheres to a "'stringent approach...to determine whether a benefits plan grants sufficient discretion to the administrator as to trigger the deferential 'arbitrary and capricious' standard of judicial review under Firestone.'" Dickerson v. Prudential Insurance Company of Am., 497 F. Supp. 2d 251, 254 (D. Mass. 2007) (quoting Rivera v. Cornell Unic., 297 F. Supp. 2d 412, 415 (D.P.R. 2003)). Under de novo review, this court must take part in an "independent weighing of the facts and opinions in [the] record to determine whether the claimant has met his burden of showing he is disabled within the meaning of the policy." Orndorf, 404 F. 3d at 518.

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recommendation would remain the same, i.e., affirming the termination of benefits.

"The standard of judicial review of [the] decision...is to some extent deferential in the sense that the reviewing court is not to set aside a factual finding of historical fact for which the record on which the decision was made contained adequate support." Recupero v. New England Telephone Co., 118 F. 3d 820, 830 (1st Cir. 1997). Here, Richards "bears the burden of making a showing sufficient to establish a violation of ERISA, namely, that the benefit termination was unreasonable." Terry v. Bayer, 145 F.3d 28, 34 (1st Cir. 1998).

While this court will not ignore any of the facts in the record, it "grants no deference to administrators' opinions or conclusions is that it is the plaintiff who bears the burden of proving he is disabled." Id. at 518-519; see also Terry, 145 F.

3d at 34 (insured bears burden of making showing sufficient to establish a violation of ERISA). As explained above, this court's review will be limited to those documents contained in the administrative record, since "the focus of the review under de novo review is still the administrator's decision and must ordinarily be based on the administrative record." Orndorf, 404 F.3d at 519.

III. MOTIONS FOR SUMMARY JUDGMENT (DOCKET ENTRY ## 21, 22, & 29)

STANDARD OF REVIEW

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 56(c), Fed. R. Civ. P. In an ERISA action, however, the court sits "more as an appellate tribunal than as a trial court." Leahy, 315 F. 3d at 18. In other words, rather than considering affidavits, the court should look at the "reasonableness of an administrative determination in light of the record compiled before the plan fiduciary." Denmark, 481 F. 3d at 26 (citing Leahy, 315 F. 3d at 18).[6] Summary judgment in the ERISA context is "simply a vehicle for deciding the issue." Orndorf, 404 F. 3d at 517. Therefore, the "non-moving party is not entitled to the usual inferences in its favor." Id. at

[6] Leahy left open the possibility that a district court might take evidence outside of the record. Leahy, 315 F. 3d at 18.

517. Cognizant of the scope of the record for purposes of summary judgment, this court finds the following facts.

FACTUAL BACKGROUND

From May 14, 1984 until January 16, 1991, Richards worked as a "50AC Software Senior Engineer" for Digital, a company HP later acquired. (Docket Entry #18, Ex. 3). As a Digital employee, Richards was offered insurance coverage under the Plan. (Docket Entry # 18 Ex. 1). Pursuant to the terms laid out in the Plan, Prudential managed and administrated all claims for disability benefits submitted by Digital employees. (Docket Entry #18, Ex. 1). The Plan is governed by ERISA. (Docket Entry #1, ¶1; Docket Entry #5, ¶ 1).

The Prudential long term disability policy provides benefits in certain situations including when an individual is "totally disabled" from performing the duties of his or her own occupation. (Docket Entry #18, Ex. 1). The Plan defines total disability as follows:

"Total Disability" exists when Prudential determines that all of these conditions are met

(1) Due to Sickness or accidental Injury, both of these are true

(a) You are not able to perform, for wage or profit, the material and substantial duties of your occupation

(b) After the Initial Duration of a period of Total Disability, you are not able to perform for wage or profit the material and substantial duties of any job for which you are reasonably fitted by your education, training or experience. The Initial Duration is shown in the Schedule of Benefits

(2) You are not working at any job for wage or profit

(3) You are under the regular care of a Doctor

(Docket Entry #18, Ex. 1).[7]

The Plan contains the following limitations:

D. BENEFIT LIMITATION

This section applies if your Total Disability, as determined by Prudential, is caused at least in part by a mental, psychoneurotic or personality disorder (including alcoholism and drug abuse)

In that case, benefits are not payable for your Total Disability for more than 24 months. There are these exceptions if you are Disabled at the end of the twenty-fourth month for which benefits are payable:

(1) If you are Confined in a Hospital for one or more of the causes at the end of the twenty-four month, the following will apply While you remain Totally Disabled, benefits are payable for the duration of that Confinement and, unless (2) below applies for up to three additional months after your Confinement ends.

(2) If, after the twenty-fourth month, you become Confined in a Hospital for one or more of the causes above for at least 14 consecutive days, the following will apply. While you remain Totally Disabled, benefits are payable for the remaining

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[7] Punctuation is taken directly from the provision.

duration of that Confinement and for up to three additional months after your Confinement ends.

But, benefits are not payable for more than the Maximum Benefit Duration

"Confined" or "Confinement" as used in this Section means a Hospital stay of at least 8 hours per day

"Hospital" means an institution that meets either of these two tests

(1) It is accredited as a hospital under the Hospital Accreditation Program of the Joint Commission on Accreditation of Hospitals

(2) It is legally operated, has 24 hour a day nursing service, and complies with (a) or (b)

(a) It mainly provides general inpatient medical care and treatment of sick and injured persons by the use of medical, diagnostic and major surgical facilities. All such facilities are in it or under its control.

(b) It mainly provides specialized inpatient medical care and treatment or persons by the use of medical and diagnostic facilities (including x-ray and laboratory). All such facilities are in it, under it's control, or available to it under a written agreement with a Hospital (as defined

above) or with a specialized provider of those facilities.

But Hospital does not include a nursing home. Neither does it include an institution, or part of one, which (I) is used mainly as a place for convalescence, rest, nursing care or for the aged, or (ii) furnishes mainly homelike or custodial care, or training in the routines of daily living, or (iii) is mainly a school

(Docket Entry #18, Ex. 1).[8]

The "initial duration" period consists of 24 months plus the "elimination period." (Docket Entry #18, Ex. 2). The "elimination period" is made up of the first 26 weeks of "continuous total disability." (Docket Entry #18 Ex. 1).

Richards applied for long term disability benefits under the Plan on May 24, 1991. (Docket Entry # 18 Ex. 3). Richards claims to be disabled

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[8] Again, punctuation is taken directly from the provision.

due to chronic fatigue immune dysfunction syndrome ("chronic fatigue syndrome").[9] (Docket Entry #18, Ex. 3).

Prudential commenced paying benefits to Richards on July 17, 1991. (Docket Entry #18, Ex. 4). On August 7, 1991, Prudential informed Richards that it would require "additional medical information and evaluation" in order to determine if Richards remained "totally disabled." (Docket Entry #18, Ex. 14). Prudential wrote that, "[T]he approval of your claim for long term disability benefits. (Docket Entry #18, Ex. 4) On July 13, 1993, Richards' maximum period of receiving benefits due to any mental, psychoneurotic or personal disorder ended. (Docket Entry # 18, Ex.

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[9] Chronic fatigue immune dysfunction syndrome is also referred to as "CFIDS."

35). To receive benefits thereafter under the terms of the Plan, the disabling condition must have prevented Richards from performing the "material and substantial duties of any job for which he was reasonably fitted by his education, training, or experience." (Docket Entry #18, Ex. 1). Prudential paid long term disability benefits to Richards until June 1, 2001. (Docket Entry #18, Ex. 35).

A. Prudential's Initial Decision

On January 17, 2001, Prudential requested medical records from Dr. Carol Englender, M.D. (Dr. Englender"), inasmuch as Prudential "under[stood] that [Richards] is/was a patient of [Dr. Englender's] practice." (Docket Entry #18, Ex. 32). On February 5, 2001, Dr. Englender advised Prudential that Richards had "not been seen in this office from 1/01/99 through the present."

(Docket Entry #18 Ex. 32 &155). In response, Prudential reviewed Richards' claim. (Docket Entry #18, Ex. 33).

On February 26, 2001, Prudential sent Richards' medical records to an independent medical examiner. (Docket Entry #18, records to an independent medical examiner. (Docket Entry #18, Ex. 35). The independent examiner was Gwen O. Brachman, M. D. ("Dr. Brachman"), who practices internal medicine, rheumatology and occupational medicine. (Docket Entry #18, Ex. 35). Dr. Brachman submitted her report to Prudential on March 23, 2001. (Docket Entry #18, Ex. 156).

In the report, Dr. Brachman acknowledged that Richards had stopped working on January 16, 1991, due to chronic fatigue syndrome and

fibromyalgia. (Docket Entry #18, Ex. 35 & 156). Dr. Brachman also noted that on March 6, 1991, Richards complained of fatigue, joint stiffness, intermittent dizziness and chronic tinnitus. (Docket Entry #18, Ex. 35 & 156). At that time, the diagnoses in Fallon Clinic medical records included "possible fibrositis and possible vertigo." (Docket Entry #18, Ex. 35 & 156). While Richards had an ear, nose and throat consultation on April 24, 1991. his physical exam remained normal. (Docket Entry #18, Ex. 35 & 156). A neurological exam completed on April 25, 1991, was also "completely normal." (Docket Entry # 18, Ex. 35 & 156).

Dr. Brachman then pointed out that Dr. Daniel O'Leary, M.D. ("Dr. O'Leary"), who examined Richards on April 18, 1991, concluded

that Richards "did not meet criteria for diagnosis of fibrositis or chronic fatigue syndrome." (Docket Entry # 18, Ex. 35 & 156). Dr. O'Leary "did not find objective evidence of a disability and did not feel that returning to work would jeopardize" Richards' healthy, according to Brachman's report. (Docket Entry #18, Ex. 105 & 156).

Dr. Brachman also noted in her report on April 29, 1991, Dr. englender evaluated Richards. (Docket Enry #18, Ex. 156). Dr. Englender reported that Richards' physical exam "revealed multiple tender sites at various tendon insertion points." (Docket Entry #18, Ex. 156). She also reported that her "impression was chronic fatigue syndrome" with "possible chemical sensitivities." (Docket Entry #18, Ex. 156). Dr. Englender indicated that Richards' was "depressed and

focused on bodily illnesses and aches." (Docket Entry # 18, Ex. 156).

As set forth in Dr. Brachman's report, Richards returned to the Fallon Clinic in October of 1997. (Docket Entry #18, Ex. 156). Richards' neurological exam was normal and while he had "multiple diffuse tender points elicited on exam," "the general physical exam was normal." (Docket Entry #18, Ex. 156). Dr. Brachman also noted that at one point Richards had been diagnosed with "intermittent urticaria, irritable bowel syndrome, mild allergies, mild hearing loss, mild bronchospasm and alopecia areata," (Docket Entry # 18, Ex. 156). None of these disorders, however, would "prohibit him from performing the essential functions of a sedentary job," according to Dr. Brachman. (Docket Entry # 18, Ex. 156).

Dr. Brachman also pointed out in her report that Richards has a long history of depression but refused to offer any medical records having to do with his depression or his psychiatric state. (Docket Entry # 18, Ex. 156). Dr. Brachman suggested that while Richards does qualify for the diagnosis of fibromyalgia, fibromyalgia is considered a syndrome and not a disease. (Docket Entry, #18 Ex. 156). Dr. Brachman therefore reasoned that Richards' depression had led to "his enhanced perception of pain leading to the development of chronic musculoskeletal pain syndrome along with Fatigue and concentration (both well recognized symptoms of depression)." (Docket Entry #18 & 156). Dr. Brachman also posited that Richards has "unrealistic expectation and goals" illustrated by his consistent assertions

that he will never be able to work again until he has been "cured or "recovered." (Docket Entry #18 & 156). Furthermore, Richards has refused to consider any accommodation that would allow him to return to the workplace, according to Dr. Brachman. (Docket Entry #18, Ex. 156). Based on all of the evidence submitted for review,[10] Dr. Brachman concluded that "Richards was not and si not currently physically impaired from performing the essential functions of a sedentary job." (Docket Entry # 18, Ex. 156).

By letter dated March 26, 2001, and as a result of Dr. Brachman's report, Prudential maintained that Richards was qualified for a diagnosis of fibromyalgia, but the medical

[10] The review included medial files from the Fallon Clinic, the reports of Dr. O'Leary and Dr. Englender, reports from Richard Tahl's Investigation ("Tahl Investigation") and disability management notes. (Docket Entry #18, Ex. 156).

documentation supported the conclusion that Richards has the "physical capacity to perform the essential functions of a sedentary occupation." (Docket Entry #18, Ex. 35). Prudential explained that Richards no longer met the criteria of totally disabled" under the Plan and determined that he was "no longer eligible for LTD benefits as of June 1, 2001." (Docket Entry # 18, Ex. 35). On various occasions between 2001 and 2004, Richards asked Prudential for information regarding the appeals process. (Docket Entry #18, Ex. 36-44).

B. Richards' First Appeal

On July 26, 2004, Richards appealed Prudential's March 26, 2001 decision. (Docket Entry #18, Ex. 45). In the appeal, Richards' argued that Dr. Brachman was not qualified to

review Richards' disability, that Prudential should have deferred to Richards' doctors and that Prudential should have relied upon a 1991 finding by an Administrative Law Judge of the Social Security Administration ("SSA") that Richards was "disabled." (Docket Entry #18, Ex. 45).

Prudential reviewed Richards' first request for "consideration for termination of his benefits" and by letter dated September 28, 2004, advised Richards the March 26, 2001 decision was indeed appropriate. (Docket Entry #18, Ex. 50). As explained in the letter, Prudential determined that Richards had been diagnosed with intermittent urticaria, irritable bowel syndrome, mild allergies, mild hearing loss, mild broncospasm, fibromyalgia, and alopecia areata as well as fatigue. (Docket Entry #18, Ex. 50). Since

Richards was past the maximum period of allowable benefits for any impairment caused in part by a phsychiatric condition, Prudential again reiterated to Richards that the assessment was limited to "impairments from physical conditions which would prevent you from performing the material and substantial duties of any job for which you are reasonably fitted by your education, training, or experience." (Docket Entry #18, Ex. 50).

As set forth in the letter, Prudential informed Richards that it had referred his medical records for review by an independent medical examiner, Dr. Brachman. (Docket Entry #18, Ex. 50). Prudential explained that Dr. Brachmand, "a physician specializing in Occupational Medicine and Rheumatology," was qualified to review the

file due to Richards' diagnosis of fibromyalgia and chronic fatigue. (Docket Entry #18, Ex. 50). Prudential also noted that although its review was independent from the SSA's findings, it did take the SSA's documentation into account as well as all of the files submitted by Richards' physicians. (Docket Entry #18, Ex. 50). Prudential further explained that although the review of Richards' file supported a diagnosis of fibromyalgia, as he has a long history of fatigue and diffuse myalgias and arthralgias, the medical evidence supported Richards' "physical capacity to perform sedentary work." (Docket Entry #18, Ex. 50).

In conducting the review, Prudential considered all of the medical documentation that had accrued since Richards' benefits ended in June 2001. (Docket Entry #18, Ex. 50). Since

2001, Richards' ailments included pain in his hands, back, hip, ankle and foot. (Docket Entry #18, Ex. 183). He was also diagnosed with trochanter bursitis, a condition that responds to treatment within two to four weeks. (Docket Entry #18, Ex. 183 & 156). Prudential noted that Richards' trochanter bursitis, therefore, would in no way hinder him from returning to a sedentary work position, which "required no prolonged walking or standing." (Docket Entry #18, Ex. 50).

The September 28, 2004 letter also noted that Prudential conducted a vocational review of Richards on September 23, 2004. (Docket Entry #18, Ex. 50 & 185). The review identified the following sedentary occupations, which Richards could perform with his limitations: "Scheduler-Computer Processing, manager-Procurement,

Instructor-Extension work, Manger-Office, and Consultant." (Docket Entry #18, Ex. 50 & 185). On September 28, 2004, Prudential's disability consultant, Celeste Kolodin ("Kolodin"), informed Richards that Prudential had again upheld its decision to terminate Richards' long term benefits claim since "documentation supports that you are medically able to perform sedentary work, and there are gainful occupations within your education, training, or experience." (Docket Entry #18, Ex. 50).

On October 15, 2004, Richards submitted a letter from his treating physician, Dr. Marc Hryniewich, M. D. ("Dr. Hryniewich"), dated October 5, 2004, as well as additional documentation from Dr. Hryniewich's office. (Docket Entry #18, Ex. 52, 113, 158). Richards

then requested that Prudential re-review the file upon receipt of the new documents. (Docket Entry #18, Ex. 53). Kolodin informed Richards on February 3, 2005, that she would be "performing a thorough evaluation of the information within your file," since Prudential had received "additional documentation from Dr. Hryniwich." (Docket Entry #18, Ex. 53).

On February 8, 2005, Kolodin finished Richards' "first request for reconsideration" in which she noted that Richards objected to the lack of deference given to his treating physician and the SSA's decision. (Docket Entry #18, Ex. 54). Accordingly, on behalf of Prudential she advised Richards to submit additional documentation if he was not satisfied. (Docket Entry #18, Ex. 54).

As also set forth in Kolodin's February 8, 2005 letter, Prudential reviewed the additional documentation and concluded that Richards did have a "foot diagnoses including metatarsagia, which might impair your ability to perform heavier duty work, but would not prevent you from performing sedentary work." (Docket Entry #18, Ex. 54). Prudential also acknowledged that Richards had "episodes of abdominal discomfort, flank pain, hip pain, fatigue and depression." (Docket Entry #18, Ex. 54 &113).

The February 8, 2008 letter concluded that , after reviewing the new documentation, Prudential found that the previous decision to terminate Richards' long term benefits was correct. (Docket Entry #18, Ex. 54 & 113).

C. Richards' Second Appeal

In accordance with the directions in the February 8, 2005 letter, on August 10, 2005, Richards appealed Prudential's September 28, 2004 decision and February 8, 2005 reconsideration to end the long term benefits to the company's Appeals Review Unit. (Docket Entry #18, Ex. 56). Richards argued that his treating physician, Dr. Hryniewich, disputed the denial in an October 5, 2004 letter and reiterated that Richards has been diagnosed with fibromyalgia and continues to remain chronically disabled. (Docket Entry #18, Ex. 156). Richards expressed his concern that "not a single person from Prudential Insurance Company contacted Dr. Mark Hyrniewich after the receipt of his letter." (Docket Entry #18, Ex. 56). In this second appeal or request for consideration, Richards contended

that Prudentials September 28, 2004 "denial letter" did not include "details on any additional material that is needed before you will start paying the claim again and the explanation of why it is needed: or "the detailed steps that must be taken to appeal the denial." (Docket Entry #18, Ex. 56).

Prudential again reviewed Richard's file and on September 29, 2005, Tara Johnson ("Johnson"), Prudential's disability consultant, completed a review and affirmed the decision to terminate benefits.[11] Prudential reasoned that based on a thorough review of the documentation done by its medical director Richard Day, M. D. ("Dr. Day"), it still believed that the decision was correct and

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[11] Prudential denotes the decision as a review of Richards' "second request for reconsideration" of the decision to terminate long term disability benefits. (Docket Entry #18, Ex. 59).

that Richards could perform the duties of a sedentary job for which he was qualified. (Docket Entry #18 Ex. 59). Again, Prudential reminded Richards that Prudentials' assessment of the claim was limited to "impairments from physical conditions, which would prevent you from performing the material and substantial duties of any job for which you are reasonable fitted by your education, training, or experience." (Docket Entry #18, Ex. 59). Prudential further reiterated that all of the "neurological assessments that you have undergone were completely normal, as were laboratory findings, and there were no rheumatological laboratory or physical findings consistent with synovitis or an inflammatory process." (Docket Entry #18, Ex. 59).

Prudential additionally explained that a psychiatric assessment was requested and performed by Ann M. Briley, M.D. ("Dr. Briley"), but Richards had refused to release it for review. (Docket Entry #18, Ex. 59). It was noted by Dr. Day that records by J.S. Sullivan, M. D. ("Dr. Sullivan") showed Richards has been seen in the past for depression by Meyers, M. D. ("Dr. Meyers").[12] (Docket Entry #18, Ex. 59, 113 & 186). Prudential also noted that in May of 2001, Dr. Englender reported that Richards had expressed "depressive symptoms." (Docket Entry #18, Ex. 59 & 113). Prudential, therefore, explained that, "with depression being listed it is not appropriate to label you with CFIDS." (Docket Entry # 18, Ex. 59).

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[12] The record does not contain Dr. Meyers' first name.

The September 29, 2005 denial letter also pointed out that, as noted in Dr. Day's April 2001 review, Dr. O'Leary's review maintained that "there is no objective evidence of disability" and that he "did not feel that [Richards] health would be jeopardized by returning to work." (Docket Entry # 18, Ex. 59). Prudential also commented that Dr. Day did not believe that Richards was being "appropriately treated for chronic fatigue syndrome, as without the use of cognitive behavioral therapy any treatment for this condition is incomplete." (Docket Entry #18, Ex. 59). As explained in the denial letters, Dr. Day noted that Richards was not being treated "for the condition of depression that has been identified in the past." (Docket Entry #18, Ex. 59).

Prudential, therefore, searched for occupations that could be performed within Richards' physical restrictions as set forth in the medical record. (Docket Entry #18, Ex. 59). A transferable skills analysis found that there were several occupational positions that Richards could take which would allow him to remain sedentary. (Docket Entry #18, Ex. 59). Accordingly, in the September 29, 2005 letter Prudential upheld the decision to discontinue long term benefits. (Docket Entry #18, Ex. 59).

D. Richards' Third Appeal

Through his attorney, Bernard A. Kansky, Esq. (Attorney Kansky"), Richards filed a third and final appeal to Prudential On January 30, 2006. (Docket Entry #18, Ex. 62). In the January 30, 2006 letter, Attorney Kansky maintained that

Prudential's September 29, 2005 decision did not set forth with the required specificity, the reasons why Richards' claim was terminated. (Docket Entry #18, Ex. 62).[13] Attorney Kansky insisted that "Mr. Richards truly has been 'totally disabled' since the original onset disability date" and that Prudential's "suggested use of cognitive behavorial therapy or CBT for the treatment of CFS/CFIDS et seq. is no different than when years ago epileptics were locked away in institutions for the mentally insane." (Docket Entry #18, Ex. 62). Attorney Kansky added that such a "rationale is unfair and is not supported except by peer reviewing physicians for the insurance industry." (Docket Entry #18, Ex. 62).

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[13] In the July 18, 2006 final review, Prudential noted that it "disagreed with this characterization and referred you to our letter dated February 6, for our response to this assertion." (Docket Entry #18, Ex. 82).

Attorney Kansky additionally asked to be present during the appeals committee review. (Docket Entry #18, Ex. 62). Prudential informed Attorney Kansky, however, that, "The Appeals Committee does not 'meet' with claimant or their representatives; rather the panel provides a third and voluntary level of appeal review." (Docket Entry #18, Ex. 72 & 73).

By letter dated June 5, 2006, Attorney Kansky complained that Richards "has been and remains totally and permanently disabled ...since 1991." (Docket Entry #18, Ex. 70). Attorney Kansky explained in the June 5, 2006 letter that Richards felt he could not even work in most sedentary occupations due to the "severity, duration, and unpredictability of his symptoms." (Docket Entry #18, Ex. 82).

The June 5, 2006 letter to Prudential also included a "detailed narrative report of Dr. Hryniewich dated June 5, 2006." (Docket Entry #18, Ex. 70). Therein, Dr. Hryniewich opines that plaintiff's chronic fatigue syndrome "has totally disabled him from any gainful employment." (Docket Entry #18, Ex. 70). Dr. Hryniewich notes that plaintiff "has tested positive for fibromyalgia" and experiences chronic pain. Pain medications such as Vicodin, however, have the side effects of "severe drowsiness' which likewise renders plaintiff unable to engage in gainful employment." (Docket Entry #18, Ex. 70). Finally, Dr. Hryniewich's June 5, 2006 letter states that plaintiff suffers from a number of conditions including severe headaches and gastritis. (Docket

Entry #18, Ex. 70). [14] By letter dated June 21, 2006, Attorney Kansky requested "the taking of the deposition of your non-examining, non interviewing IME 'specialist,' Gwen O. Brachman, MD, MS, MPH, FACOM, who does not appear to engage in any substantial private practice of medicine; who has not earned or qualified for her alleged specialty of Rheumatology." (Docket Entry #18, Ex. 75). On June 23, 2006, Attorney Kansky sent another letter to Prudential indicating his disagreement with Prudential's decisions and opining that Prudential's initial termination letter was "lengthy, convoluted, and appeared to have no basis in fact, law, or medicine." (Docket Entry #18, Ex. 82). Attorney Kansky also explained that

[14] As explained infra, a board certified rheumatologist reviewed, discussed and addressed the aforementioned findings of Dr. Hryniewich in the June 5, 2006 narrative report.

due to a recent Seventh Circuit case, Diaz v. Prudential, 424 F.3d 635, 639 (7th Cir. 2005), "Prudential will be on extremely 'thin ice' if it doesn't fully reinstate the Long Term Disability benefits of Mr. Richards ..." (Docket Entry # 18, Ex. 78).

On July 18, 2006, Prudential informed Attorney Kansky that Prudential had completed a review with respect to the third request for reconsideration and again determined that the initial decision to discontinue benefits was appropriate. (Docket Entry #18, Ex. 82). In fact, Prudential granted attorney Kansky three extensions to file additional information. (Docket Entry #18, Ex. 82).

In the July 18, 2006 denial letter, Prudential discussed and relied upon the medical history

review conducted in April of 2006 by Dayton Dennis Payne, M.D. ("Dr. Payne"), a board certified rheumatologist. (Docket Entry #18, Ex. 82 & 162).[15] Dr. Payne found that Richards was "a 53 year old male with a history of a 'viral illness' that occurred in 1991 that was followed by an onset of diffuse and widespread pain, fatigue, non-restorative sleep, stiffness, and headaches," (Docket Entry #18, Ex. 82 & 162). Dr. Payne's report acknowledged that Richards had been diagnosed with chronic fatigue syndrome, chronic fatigue immune dysfunction syndrome and fibromyalgia syndromes. (Docket Entry #18, Ex.

[15] Dr. Payne reviewed Richards' medical records from 1988 to 2006 prepared by Dr. Hryniewich; medical records from 1989 to 1991 prepared by Ethan Nydorf, M.D. ("Dr. Nydorf"); medical records from 1991 prepared by C.E. Hylanderk, M. D. ("Dr. Hylander"), John Zieminski, M.D., and C. Seidler, M.D. ("Dr. Seidler"); and M.D. ("Dr. Williams") and Kevin Moran, D.P.M ("Dr. Moran"). (Docket Entry #18, Ex. 82 & 162).

82 & 162). Richards had also reported other "somatic symptoms" that included short term memory and concentration difficulties, irritable bowel syndrome, and depression. (Docket Entry #18, Ex. 82 & 162). Dr. Payne also referred to a diagnosis of "possible bursitis." (Docket Entry #18, Ex. 82 & 162).

Dr. Payne found that there was no documentation to support a finding of "destructive rheumatic finding...limitation of motion within any of his joints...weakness or atrophy...cardiac or pulmonary problems." (Docket Entry #18, Ex. 82 & 162). Dr. Payne maintained that the "medial record data contains no objective findings that document any degree of joint deformity, inflammation, damage, atrophy, limitation of motion, or any other disease process that would

be expected to lead [to] any restrictions or limitations." (Docket Entry #18, Ex. 82 & 162). Furthermore, Dr. Payne reported that the "objective medical records contain no clinical, laboratory, or testing findings that would be expected to lead to any degree of disability from a physical disease process." (Docket Entry #18, Ex. 82 & 162). Dr. Payne added that, "Richards would be expected to have functional capacity commensurate with age-matched controls." (Docket Entry #18, Ex. 82 & 162). Finally, Dr. Payne could find no objective evidence which supported Richards' complaints or the various diagnoses. (Docket Entry #18, Ex. 82 & 162). Accordingly, Dr. Payne posited that "no restrictions or limitations should be placed on Mr. Richards." (Docket Enry #18, Ex.82 & 162).

In addition to relying upon the foregoing findings and conclusions by Dr. Payne, Prudential relied upon an evaluation of all the medical records conducted by Paul F. Howard, M.D. ("Dr. Howard"), a board

certified rheumatologist. (Docket Entry #18, Ex. 82 & 79).[16] In a report dated July 6, 2006, Dr. Howard found that Richards' "overall degree of functional impairment relating to rheumatological findings consistent with fibromyalgia are mild in nature." (Docket Entry # 18, Ex. 82 & 79). In particular, he opined that Richards' functional impairment from 2001 until 2006 was "mild in nature." (Docket Entry #18, Ex. 82 & 165). Dr. Howard supported the prognosis by the opinions

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[16] Dr. Howard reviewed the following documents: Fallon Clinic medical records from 1988 through June 2006; letter from Dr. O'Leary dated April 21, 1991; letters from Dr. Englender, Dated May 7, 1991 to June 6, 1991; investigative reports from TAHL Investigations dated February 4, 1992 and June 30, 1992; handwritten appeals letter from claimant dated August 21, 1992; SSA decision dated October 23, 1992; laboratories from Dr. Seidler dated February 20, 1997; telephone log records from 1997 to June 22, 2006; medical review by Dr. Brachman dated March 23, 2001; physical therapy records from July 30, 2002 to November 3, 2005; "SOAP" notes from Prudential Financial dated September 28, 2005; medical review by Dr. Payne dated April 19, 2006; attorney communications dated June 5, 2006, which includes Dr. Hryniewich's narrative report in letter form, and June 21, 2006; appeals letter (undated); and Richards' job description. (Docket Entry #18, Ex. 79 & 82)

of Dr. O'Leary, who found "no objective evidence of disability," and Dr. Englender, who believed that Richards "was unable to perform the functions of his job because of his energy instability and fluctuations in ability to concentrate." (Docket Entry #18, Ex. 82 & 165). Dr. Howard noted that both Dr. O'Leary and Dr. Englender concluded that Richards could return to work full time at some point. (Docket Entry #18, Ex. 82 & 165). In the report, Dr. Howard also noted Dr. Hryniewich's June 27, 2001 findings after "a comprehensive physical examination" that "there were no findings of any neurological deficit." (Docket Entry #18, Ex. 82 & 165).

Dr. Howard's review relied upon by Prudential also addressed the concerns and findings of Dr.

Hryniewich contained in the June 5, 2006 letter. (Docket Entry #18, Ex. 82 & 165). Dr. Howard's report, which contains a summary of the June 5, 2006 letter on pages seven and eight, discounts the findings. (Docket Entry #18, Ex. 82 & 165). Dr. Howard maintained, "there has been a lack of significant clinical abnormalities to account for any significant degree of function impairment as of June 1, 2001." (Docket Entry #18, Ex. 82 & 165). Furthermore, "starting June 1, 2001 forward, there are no consistent medical findings of any significant degree of functional impairment of a rheumatological nature, specifically in relation to the diagnosis of fibromyalgia." (Docket Entry #18, Ex. 82 & 165). Dr. Howard explained that, "[T]he medical records only support a minimal impairment in direct relation to the

findings of fibromyalgia and the resulting pain complaints" and further noted that while Richards is "highly encouraged to exercise," "he has not been compliant with the condition and exercise program which would create a moderate-to significant degree of improvement in his overall functional capacity." (Docket Entry #18, Ex. 82 & 165). Finally, Dr. Howard came to the conclusion that "Richards' degree of self-reported chronic pain is not supported by extensive physical examination findings spanning in excess of 10 years." (Docket Entry #18, Ex. 82 & 165).

After reviewing all of the medical records, Dr. Howard reasoned that "overall the physical examination findings have been minimal, if any, and he has no specific diagnostic test to support his self-reported chronic pain." (Docket Entry #18,

Ex. 82 & 165). Dr. Howard added that there is an "absence of any abnormalities by radiological study, laboratory studies, and as noted above, repeated physical examination findings of the neurological, muscloskeletal-osseous systems" in Richards' medical history. (Docket Entry #18, Ex. 82 & 165). While Richards had been prescribed medication, Dr. Howard noted that there is no mention in Dr. Hryniewich's records of any related side effects. (Docket Entry #18, Ex. 82 & 165). Dr. Howard concluded his review by noting that even with a "mild degree of impairment, " Richards would be:

> Unrestricted to sitting, walking occasionally, standing frequently, lifting up to 20 pounds occasionally and 10 pounds frequently, carrying up to 20 pounds occasionally; pushing and pulling up to 20 pounds maximum; reaching above unrestricted; reaching below waist level frequently; upper extremity function including

that of handling, fingering, feeling, fine finger dexterity, inching, gripping and grasping unrestricted.

(Docket Entry #18, Ex. 82 & 165).

In response to the two independent reports of Dr. Payne and Dr. Howard, Prudential conducted another vocational review. (Docket Entry #18, Ex. 82 & 165). The review confirmed that there were sedentary positions available, which were within Richards' "education, training, or experience," as required by the Plan. (Docket Entry #18, Ex. 82). In the final denial letter dated July 18, 2006, Prudential noted that while Richards made the case that there should have been an independent medical examination when Richards' benefits were terminated, Richards did not appeal the termination benefits until July 26, 2004, three years after Prudential's initial decision to end his

long term benefits. (Docket Entry #18, Ex. 82). Prudential also questioned Richards' "alleged lack of financial income as a result of this termination," since it took Richards three years to appeal Prudential's ruling. (Docket Entry #18, Ex. 82).

In sum, Prudential conducted a thorough review and analysis of the initial termination of benefits. The July 18, 2006 denial relied on both the exhaustive findings of Dr. Howard as well as Dr. Payne. (Docket Entry #18, Ex. 82). Prudential concluded that after reviewing the totality of the information in Richards' file as well as the two new independent medical reviews, "Richards has been capable of returning to work on a full time basis in both his own occupation as well as in an alternate, gainful occupation since at least June

1, 2001." (Docket Entry #18, Ex. 82). Prudential, therefore, upheld the determination to terminate Richards' long term disability benefits. (Docket Entry #18, Ex. 82). On July 19, 2006, Attorney Kansky requested the names, addresses and resumes of Dr. Howard, Dr. Payne, and Gregg Schwarzkopf ("Schwarzkopf"), Prudential's vocational rehabilitation consultant, which were provided to Attorney Kansky on August 7, 2006. (Docket Entry #18, Ex. 83 & 84).

## DISCUSSION

### A. Long Term Disability Benefits (Count I)

Richards raises a number of arguments to challenge the correctness of Prudential's decision to deny long term disability benefits on the basis that he is "Totally disabled" within the meaning of

the Plan. First, he submits that Dr. Brachman misrepresented her credentials, only received and reviewed 20% of the file and never contacted Richards' treating physician, Dr. Hryniewich. (Docket Entry #18, Ex. 38). The argument is misguided for a number of reasons.

Specifically, Richards maintains that Dr. Brachman lacked the "proper qualifications and expertise necessary to conduct a proper evaluation of chronic fatigue." (Docket Entry #18, Ex. 45). Dr. Brachman, however, is an assistant clinical professor of medicine with an M.D., an M.S., and an M.P.H. In addition, she is a fellow of the American College of Occupational and Environmental Medicine. (Docket Entry #18, Ex. 156). Moreover, even Richards' background check on Dr. Brachman revealed that she is "Bd.

Certified: Internal Medicine," had her training at "Boston University School of Medicine," with "Clinical Interests: Occupational medicine including: exposure, pulmonary, musculoskeletal, rheumatologic, allergic and dermatologic diseases." (Docket Entry #18, Ex. 45). In short, Dr. Brachman did not misrepresent her credentials and is qualifed to render an opinion regarding Richards' condition.

Richards also claims that Dr. Brachman's evaluation is incorrect because he has no history of depression that could cause symptoms similar to chronic fatigue syndrome. (Docket Entry #38). Dr. Brachman, however, relied on documentation in the administrative record which showed that Richards has been "seen for depression by Dr.

Meyer and has had some recent counseling." (Docket Entry #18, Ex. 113).

Richards additionally argues that Prudential did not provide him with enough information in its letters concerning the termination of his benefits. (Docket Entry # 38). "The denial letter need not detail every bit of information to render the decisions to deny benefits susceptible to judicial review. When the standard of judicial review is de novo, then the administrator, of course, runs a greater risk of reversal if there is little discussion of the evidence about disability." Orndorf, 404 F.3d at 526. In Richards' case , however, Prudential went to great lengths as recounted above to detail the different independent medical reports and to discuss its reasons to deny benefits. (Docket Entry #18).

Therefore, this court does not read the denial of benefits to have ignored evidence offered by Richards. On the contrary, Prudential exhaustively provided Richards with the information Prudential relied upon and considered in determining eligibility.

Richards' third argument concerns Prudential's requirement that he submit "'objective medical evidence.'" (Docket Entry # 38). Richards argues that Prudential request for "objective medical evidence was an "unreasonable and impossible obstacle for patients such as the Plaintiff to satisfy." (Docket Entry #38). In point of fact Prudential does not require "objective medical evidence" to establish "Total disability" under the Plan. (Docket Entry #18, Ex. 1). Prudential , however, does allow appellees to submit their own

"additional evidence" to be considered by the Appeals Committee. (Docket Entry #18, Ex. 1).

Richards next argument is that Prudential should have given deference to the findings of the United States Federal Court Administrative Law Judge." (Docket Entery #45). "Benefits elegibility determinations by the Social Security Adminsitration are not binding on disability insurers." Pari-Fasno, 230 F.3d at 420. The criteria to determine "eligibility for Social Security disability benefits are substantively different than the criteria," Id., set forth in the Plan at issue in this case. The medical record is also different inasmuch as it did not contain the opinions of a number of Prudential's non-examining physicians. Accordingly, although this court has considered the SSA decision, this court declines

to afford the decision controlling weight. See Id. ("although a related Social Security benefits decision might be relevant to an insurer's eligibility determination, it should not be given controlling weight except perhaps in the rare case in which the statutory criteria are identical").[17]

Richards' primary argument concerns Prudential's failure to afford substantial weight to the opinions of his treating physician, Dr. Hryniewich, while affording undue weight or reliance upon the reports of the non-treating physicians who simply reviewed the medical record, i.e., Drs. Brachman, Day, Payne and Howard. (Docket Entry #18). The Supreme Court

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[17] Prudential considered the SSA finding, although it noted that it "determinations are independent from those of the Social Security Administration." (Docket Entry #18, Ex. 50). This court likewise considered the SSA decision while conducting an independent review of the record.

in Black and Decker Disability Plan held that courts "have no warrant to require plan administrators automatically to accord special weight to the opinions of a claimant's physician; nor may the courts impose on such administrators a discrete burden of explanation when such administrators credit reliable evidence that conflicts with a treating physician's evaluation." Black and Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003). Furthermore, the opinions of treating physicians are "not entitled to special deference" where, as here, de novo review applies to the decision to deny benefits. See Orndorf, 404 F.3d at 526 (citing Black & Decker Disability Plan, 538 U.S. at 831). With the exception of Dr. Englender, Prudential's physicians did not examine Richards. The fact

that Prudential relied upon medical reviews conducted by non-examining physicians nevertheless does not warrant overturning the decisions to deny benefits. Orndorf v. Paul Revere Life Ins. Co., 404 F.3d at 526 (noting that "Revere did not have its own physician examine Orndorf, as opposed to reviewing records" but that "[d]enials of benefits may be based on review of medical records submitted by claimant").

As explained infra, an independent weighing of the facts and opinions in the administrative record demonstrates that Richards did not meet his burden to show that he is disabled within the meaning of the Plan. Moreover, like the thorough review conducted by a "board certified internal medicine physician: in Orndorf, 404 F. 3d at 526 (upholding denial of benefits on de novo review

while noting that, "Orndorf's claim was thoroughly reviewed by a board certified internal medicine physician"), Drs. Payne and Howard, both board certified rheumatologists, exhaustively reviewed and addressed the medical opinions in the record.

The primary evidence Richards offers to establish his disability are the records of his treating physician, Dr. Hryniewich. Dr. Hryniewich provided two letters on Richards' behalf, the first on October 5, 2004 which reads:

> This letter is to state that Edward Richards is a patient under my care. Over the last 15 years he has been treated for fibromyalgia for the last 15 years after presenting with total disability as the result of his multiple trigger points and chronic pain consistent with fibromyalgia. He has been followed in the past by at least two different rheumatologists. More recently he has been treated for trochanteric bursitis related to his multiple trigger points. He has received injections of corticosteroids in this trigger points, particularly his trochanteric bursa. The patient

does continue to have diagnosis of fibromyalgia and remains chronically disabled.

(Docket Entry # 18, Ex. 158).

The second letter Dr. Hryniewich sent to

Prudential on June 5, 2006, in support of

Richards' claim reads:

Mr. Edward F. Richards has been a regular patient of mine during the past 16 years. During that time he has been and continues to need care and treatment for the multiple physical symptoms he suffers as a direct and proximate result of the Chronic Fatigue Immune Dysfunction Syndrome (CFIDS) disease, which has totally disabled him from any gainful employment activity since 1991...based upon my having come to know Mr. Edwards as a person as well as a patient, and based upon my having examined and treated him during the past 16 years, it is my opinion to the reasonable degree of medical certainty that Mr. Edwards has been totally and permanently disabled from engaging in and maintaining any gainful employment activity since 1991, up to and including the present and further it is likely that his total and permanent disability will continue for the foreseeable future. Prognosis for Recovery: Guarded, inasmuch as there is still no cure, treatment satisfactory management program for his disease or its many physical symptoms.

(Docket Entry #18, Ex. 70). The thorough review by Dr. Howard on July 6, 2006, discussed and adequately distinguished Dr. Hyrniewich's letter. None of the other medical evaluations suggested that Richards is indefinitely "Totally disabled." (Docket Entry # 18, Ex. 1). Dr. O'Leary first concluded that Richards "does not have all the subjective criteria of chronic fatigue syndrome" and "found no objective evidence of disability" in April of 1991. (Doctor Entry #18, Ex. 105).[18] On May 7, 1991, Dr. Englender found that "at this time Mr. Richards is unable to perform the functions of his job because of his energy," but she concluded that "with intensive treatment, he

[18] He also noted that Richards' "roommate has been diagnosed to have chronic fatigue syndrome." (Docket Entry # 18, Ex. 105). Dr. Hryniewich reiterated this in his May 17, 1991 consult with Richards in which he recorded that Richards said his roommate was "diagnosed with chronic fatigue syndrome two years ago." (Docket Entry #18, Ex. 113).

should be able to return to at least part time work in 3 to 4 months and within 6 to 8 months, he should be able to return full time." Prudential attempted to have a psychiatrist ,Dr. Briley provide a complete examination of Richards, but after the examination, Richards instructed Dr. Briley not to release his report. (Docket Entry #18, Ex. 10, 13, &14).

In February of 1995, Prudential approved Richards claim, having "received the Attending Physician's Statement from Dr. Englender." (Docket Entry #18, Ex. 23). Prudential wrote to Richards on February 21, 1995 and explained that they would "periodically request medical evidence of your continued disability." (Docket Entry #18, Ex. 23). The Plan allows Prudential to make such requests. (Docket Entry #18, Ex. 1, p.

15). Prudential then continued to ask for updates from Richards concerning his condition over the next five years. (Docket Entry #18, Ex. 24-28).

On February 26, 2001, Prudential obtained the services of an outside medical expert, Dr. Brachman. (Docket Entry #18, Ex. 33) Prudential asked Dr. Brachman to "review this file, provide a report summarizing the records, and provide Mr. Edward's current diagnoses, comment on the treatment, and his current impairment from his physical diagnoses." (Docket Entry #18, Ex. 33). In her four page, single spaced report, Dr. Brachman concluded that Richards had been diagnosed with "intermittent urticaria, irritable bowel syndrome, mild allergies, mild hearing loss, mild bronchospasm and alopecia areata," but that "none of these disorders are a degree of severity to

prohibit him from performing the essential functions of a sedentary job." (Docket Entry #18, Ex. 34 & 156). Dr. Brachman also noted that Richards has a "long history of depression" as well as a history of fatigue, but hat his file showed no evidence of synovitis, deformity or decreased range of motion of any joint and his neurological functions were normal. (Docket Entry #18, Ex. 156). According to Dr. Brachman, Richards' qualifies for a diagnosis of fibromyalgia, but Richards' depression caused "an enhanced perception of pain leading to the development of chronic musculoskeletal pain syndrome, along with fatigue and concentration difficulties." (Docket Entry #18, Ex. 156). Dr. Brachman therefore justifiably concluded that, "Richards was not and is not currently physically impaired

from performing the essential functions of a sedentary job." (Docket Entry #18, Ex. 156). Consequently, Prudential notified Richards on March 26, 2001, that he no longer met the Plan's eligibility criteria for total disability benefits. (Docket Entry #18, Ex. 35).

In the second appeal dated September 29, 2005, Dr. Day reviewed the medical records and found that "the neurological assessments were completely normal, as were laboratory findings and there were no rheumatological laboratory or physical findings consistent with synovitis or any inflammatory process." Hence, he logically found that , "[T]here were no restrictions for any of the conditions that would prevent work at a sedentary level." (Docket Entry #18, Ex. 185). Prudential therefore sent Richards another notification that

is was upholding its decision on September 29, 2005. (Docket Entry #18, Ex. 54).

As noted above, on June 5, 2006, Richards offered another letter from Dr. Hryniewich. (Docket Entry #18, Ex. 70). As part of the review by the Appeals Committee, two independent board certified rheumatologists and internists reviewed Richards' file. (Docket Entry # 18, Ex. 162 & 165). On January 30, 2006, Dr. Payne, having reviewed Richards' October 5, 2004 letter, concluded that all of Richards' tests were within the normal limits and that there appeared to be "no objective functional impairments" that were "supported in the available medical record data." (Docket Entry # 18, Ex. 162). According to Dr. Payne's report, the medical file found not destructive rheumatic findings or any limitations in the range of motion

in Richards' joints. (Docket Entry #18, 162). Dr. Payne opined that "no restrictions or limitations should be placed on Mr. Richards. " (Docket Entry #18, Ex. 162).

On July 6, 2006, Dr. Howard reviewed the entire record, including the October 2004 and June 2006 letters by Dr. Hryniewich. (Docket Entry #18, Ex. 79 & 165). Dr. Howard opined that Richards' "overall degree of functional impairment relating to rheumatic findings consistent with fibromyalgia are mild in nature." (Docket Entry #18, Ex. 79 & 165). He maintained that while there "was some noted synovitis of the second and third MPJ along with fibromyalgia and osteoarthritis," all of the laboratory studies were normal. (Docket Entry # 18, Ex. 79 & 165). In fact, he pointed out that after June 2001, "there

are no consistent medical findings of any significant degree of functional impairment of rheumatic nature specifically in relation to the diagnosis of fibromyalgia." (Docket Entry #18, Ex. 70 & 165). Dr. Howard concluded that Richards' medical records dating back to 1989 "do no support a significant degree of impairment" and that "Richards' degree of self-reported chronic pain is not supported by extensive physical examination findings spanning in excess of 10 years." (Docket Entry #18, Ex. 70 & 165).

Based on Dr. Payne's and Dr. Howard's findings, Prudential notified Richards on July 18, 2006, that the appeals committee had concluded that, "[T]he medical evidence overwhelmingly supported that Mr. Richards has been capable of returning to work on a full time basis in both his

own occupation as well as in an alternate, gainful occupation since at least June 1, 2001." (Docket Entry #18, Ex. 82). The conclusion was correct. See, e.g., Orndorf, 404 F.3d at 526 (upholding denial of benefits partly on basis that "Orndorf's claim was thoroughly reviewed by a board certified internal medicine physician").

In sum, it is Richards' burden in this case to show that his condition totally disables him from performing his job as a software engineer or a position that is comparable with his "education, training or experience." (Docket Entry # 18, Ex. 1). With the exception of Dr. Hryniewich, every doctor found that Richards' condition would allow him to occupy a sedentary position at work or that with treatment he should be able to return to work within a period of time. While Richards

offers two letters as well as medical records from his treating physician Dr. Hryniewich, neither Prudential nor this court has to give preference to the claimant's treating physician given the thorough review of Richards' condition set forth in the administrative record. See Black and Decker Disability Plan, 538 U.S. at 834.

All of the doctors who reviewed Richards' file were qualified to make a determination and did so with great care and detail. (Docket Entry #18). All of the denial letters Prudential sent to Ricards set out the reasons for the termination of his benefits in detail and addressed the concerns that Richards expressed in the appeal letters. (Docket Entry # 18).

In short, the overwhelming weight of the facts and opinions in the administrative record

establish that Richards was not "totally disabled" within the meaning of the Plan. (Docket Entry # 18, Ex. 1). Richards does not meet his burden of proof to show that he meets the definition of a total disabled employee under the Plan.

B. Breach of Duty of Disclosure (Count II)

Defendants also move for summary judgment on the breach of the duty of disclosure claim in Count Two. Count Two asserts that on January 30, 2006, defendants "failed to produce certain items and documents items and documents as provided by 29 USCA § 1132 (a)-(c) inclusive." (Docket Entry #1). Richards does not address this issue in his summary judgment motion or in opposition to defendants' summary judgment motions. (Docket Entry ## 31 & 38).

Defendants argue that they are entitled to judgment on Count Two because Richards never submitted a request for Plan documents.

Under ERISA, a plan administrator can be found liable if it does not offer the claimant or beneficiary with all documents enumerated under the statue. 29 U.S.C. § 1132 (c) (1). The term administrator under ERISA means "(I) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor..." 29 U.S.C. § 1002 (16) (A). Accordingly, it is the plan "administrator" who must provide the documentation upon request. Richards, however, did not submit a request to the plan administrator, i.e. Digital. Instead, on January 30,

2006, he submitted a request for the administrative record to Prudential.

As previously explained, where, as here, the Plan does not designate an administrator, the plan sponsor is the administrator. Under ERISA, the term "plan sponsor" means "(I) the employer in the case of the employee benefit plan established or maintain by a single employer." 29 U.S.C. § 1002 (16) (B); see Caffey v. Unum Life Ins. Co., 302 F. 3d at 584-585 ("definition of 'plan administrator in ERISA provides that the plan administrator is the 'plan sponsor' unless otherwise specified in the plan").

Because "only plan administrators are liable for statutory penalties under § 1132 (c), .... an insurance

Company, which is not a plan administrator, cannot be liable for statutory damages for failure to comply with an information request." Caffey, 302 F.3d 439, 444, (10th Cir. 1996) (administrator "is the only party liable to [p]lantiff under § 1132 (c)"); Klosterman v. W. General Management, Inc., 32 F.3d 1119, 1122 (7th Cir. 1994) (Section 1132 (c) (1) cause of action for failure to disclose documents "is proper only against the plan administrator"); Lee v. Burkhart, 991 F.2d 1004, 1010 (2nd Cir. 1993) (same).

Accordingly, only Digital faces the prospect of personal liability under the section 1132 (c) (1) claim in Count Two. Digital, in turn is not liable because Richards never submitted a request for documentation to Digital.

In any event, there was no violation of section 1132 (c) (1) because Richards received all of the requested information in a timely manner. Richards sent the request to Prudential. In the January 30, 2006 letter, Richards requested the "date of the last check" that was issued to him by Prudential, " a copy of the written explanation of why his benefits were being stopped," the "correct address of the appeals committee" and "a complete copy of the plan which was in effect at the time Mr. Richards was first receiving his LTD benefits along with a calculation as to how his benefits were tabulated along with a copy of the Summary Plan Description then in effect." (Docket Entry #18, Ex. 62).

Prudential replied to Richards' letter on February 6, 2006. (Docket Entry #18, Ex. 63). In

the response, Prudential explained that a "complete copy of Mr. Richards' claim file and policy, to include copies of all reviews of the file, was sent to him on October 25, 2005." (Docket Entry #18, Ex. 63). It noted that the letters dated March 26, 2001, February 8, 2005 and September 29, 2005 detailed the "explanation of the termination of benefits" and therefore referred Richards to those letters. (Docket Entry #18, Ex. 63). Prudential maintained, "the address that you have sent your appeal letter to is the correct address for the Appeals committee." (Docket Entry #18, Ex. 63)

Prudential therefore responded to Richards in a timely manner and furnished upon him those documents and materials he requested in his January 30, 2006 letter. (Docket Entry ## 62 &

63). Furthermore, there is no evidence that Prudential acted as administrator in any of his pleadings. See Sullivan v. Raytheon Co., 262 F.3d 41, 52, (1st Cir. 2001). Therefore, defendants are entitled to judgment as a matter of law on Count Two.

## CONCLUSION

In accordance and as provided in the foregoing discussion, this court **RECOMMENDS** that defendants' motion for summary judgment (Docket Entry ## 21 & 22) be **ALLOWED** and that the Richards' motion for summary judgment (Docket Entry # 29) be **DENIED**. Defendants' motion to strike (Docket # 33) is **ALLOWED** in part and **DENIED** in part; defendants' motion to an establish abuse of discretion standard (Docket

Entry #19) is **DENIED**; and Richards' motion for de novo review (Docket Entry #17) is **ALLOWED**.

/s/ Marianne B. Bowler
**Marianne B. Bowler**
United States Magistrate Judge

## CERTIFICATE OF SERVICE

I, the undersigned counsel for the Petitioner, Edward F. Richards, do hereby certify that appropriate copies of the within Appendix II filed in support of the Petitioner's Petitioner For Writ of Certiorari was appropriately forwarded to opposing counsel of record, by hand delivery or by first-class postage prepaid United States Mail on the month day and year set forth below.

Date: SEPTEMBER 28, 2010

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